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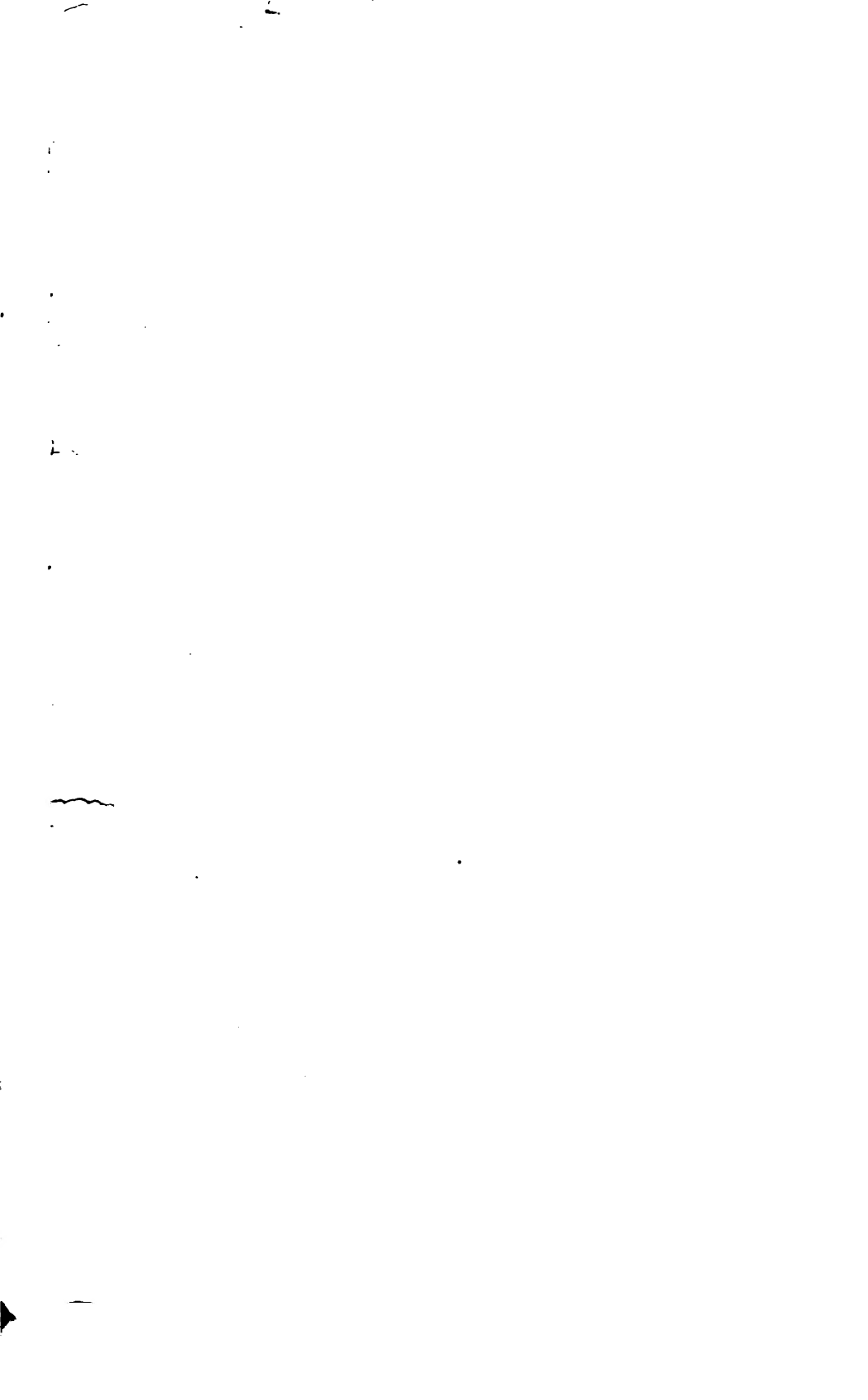
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87
REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF NOVEMBER 20, 1883, TO AND INCLUDING DECISIONS OF FEBRUARY 8, 1884.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING NOVEMBER 20, 1883.

ALMIRA HANCOCK, Respondent, v. GEORGE W. RAND et al.,
Appellants.

Persons belonging to the army and navy, who have no permanent residence they can call home, are to be regarded as travelers when stopping at public inns; to deprive them of their privileges as such, and to give them the character of boarders merely, it must appear that an explicit contract was made to that effect.

Plaintiff and her husband H., who was an officer in the United States army, having no permanent home, but living where military duty called him, occupied rooms in the defendant's hotel under an agreement, by which they were to so occupy, upon terms specified, until the spring or summer following, provided every thing was satisfactory, and the husband was not sooner ordered away on military duty. H. and family took their meals at the hotel restaurant, paying for each meal the same as other guests. No notice was posted in said rooms as prescribed by the Innkeepers Act (Chap. 421, Laws of 1855). In an action to recover the value of property of plaintiff, stolen from said rooms while so occupied, *held*, the facts justified a finding that the relation between the parties was that of innkeeper and guest; and so that defendants were liable.

It appeared that defendants kept separate apartments for boarders and for transient persons, and that H. and family were registered among the former. *Held*, in the absence of proof that H. was aware of this fact, defendants' liability was not affected thereby.

It appeared that H. and family for several years prior to their going to defendants' hotel had been boarding at another hotel in the same city.

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Held, that this did not affect the question of their relationship with defendants, or establish that they were citizens of that city. *Vance v. Throckmorton* (5 Bush, 41), *Manning v. Wells* (9 Humph. 746), *Hursh v. Byers* (29 Mo. 469), *Pollock v. Landis* (36 Iowa, 651), *Lusk v. Belote* (22 Minn. 468), distinguished.

(Argued October 10, 1883 ; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

Theo. C. Sears and *Chas. P. Crosby* for appellant. Defendants' liability to plaintiff can arise in this action only from the fact that she was a traveler or passenger. (*Mowers v. Feathers*, 61 N. Y. 34; *Drope v. Thain*, Tatch. 127; *Grimstone v. Innkeeper*, Hetter, 49; Chitty on Contracts, 476; Bacon's Abr. 228; Story on Bailments, § 475; Parsons on Contracts, 145; *Thompson v. Lacy*, 3 B. & Ald. 283, 286; Edwards on Bailments, 388.) General Hancock and family were not "guests" of the defendants, because they were not travelers or passengers. (17 Hun, 283; Story on Bail., § 477; Edwards on Bail., 394; 2 Parsons on Contracts, 150; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Pinkerton v. Woodward*, 33 Cal. 557; *Norcross v. Norcross*, 53 Me. 169; *Walling v. Potter*, 35 Conn. 583; *McDaniels v. Robinson*, 26 Vt. 316; *Vance v. Throckmorton*, 5 Bush [Ky.], 41; *Manning v. Wells*, 9 Humph. [Tenn.] 746; *Hirsh v. Byers*, 29 Mo. 469; *Pollock v. Landis*, 36 Iowa, 651; *Lusk v. Belote*, 22 Minn. 468; *Chamberlain & Co. v. Masterson*, 26 Ala. 371; *Ingallsbee v. Wood*, 33 N. Y. 577.) The defendants did not receive the plaintiff into their hotel as a guest, but as a permanent boarder. (*Stewart v. McCready*, 24 How. 62; *Willard v. Reinhart*, 2 E. D. Smith.) The referee committed error in the admission of the testimony of General and Mrs. Hancock, as to the value of the articles

Statement of case.

lost. (*Terpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 282; 1 Greenl. Ev., § 440; 1 Phillips' Ev. 290; *Clark v. Baird*, 5 Seld. 183; *Bedell v. T. I. R. R. Co.*, 44 N. Y. 267; *McCormick v. Railroad Co.*, 49 id. 303; *Gouge v. Roberts*, 53 id. 619; *Jay v. Hopkins*, 5 Denio, 84; 3 Abb. N. Y. Dig. 70, § 1024; *Culver v. Haslam*, 7 Barb. 320; *Chambers v. Cogney*, 85 N. Y. Sup. Ct. 174; *Harris v. Panama R. R.*, 3 Bosw. 7; *Morehouse v. Matthews*, 2 Conn. 514.)

George G. Munger for respondent. A mere reduction of price, even though accompanied by a promise or agreement as to length of stay, does not alter the relationship of landlord and guest. (17 Hun, 279; *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 169; *Lima v. Dwinell*, 7 Alb. L. J. 44; Story on Bail., § 477; *Hall v. Pike*, 100 Mass. 495; *Jolie v. Cardinal*, 35 Wis. 118; *Lusk v. Belote*, 22 Minn. 468; *Richmond v. Smith*, 8 B. & C. 000; *Parker v. Flint*, 12 Mod. 255; *Walling v. Potter*, 35 Conn. 183; 5 Tenn. 273; 5 Barb. 568; *Allen v. Smith*, 12 C. B. [N. S.] 618; *Kisten v. Hildebrand*, 9 B. Monr. 72; Bac. Abr., Inns and Innkeepers, chap. 5; Story on Bail., § 177.) The finding of the referee that there was no special contract is essentially one of fact, and is supported by sufficient evidence, and the Court of Appeals will not reverse the conclusion of the referee on such a question after it has been passed upon by the General Term. (Code of Civil Proc., §§ 1337, 1338; *Griffin v. Marquardt*, 17 N. Y. 28; *Dain v. Wyckoff*, 18 id. 45; *Priest v. Price*, 3 Keyes, 222; *Colwell v. Lawrence*, 38 N. Y. 71; *Cady v. Allen*, 18 id. 573; *Metcalf v. Mattisons*, 32 id. 464; *Ostrander v. Fellows*, 39 id. 350; *Davis v. Spencer*, 24 id. 386; *Wegman v. Childs*, 41 id. 159; *Burgess v. Simonson*, 45 id. 225; *Dayton v. Borst*, 31 id. 435; *Newton v. Bronson*, 13 id. 587.) The fact that at the time of the loss meals were furnished to plaintiff from the general restaurant of the hotel, when ordered and only when ordered *à la carte* from the regular bill of fare as furnished to all customers, and were paid for by plaintiff

Statement of case.

at the regular prices set down on such bill of fare, without reduction of any kind, would establish the liability of the innkeeper, even though plaintiffs had rooms outside of the hotel, and from other parties. (*McDonald v. Edgerton*, 5 Barb. 560; *Parker v. Flint*, 12 Mod. 255; *Bennett v. Ditson*, 5 Term R. 273; *Kopper v. Willis*, Gen. Term, N. Y. Com. Pleas, Jan. 31, 1881; Daily Reg., Jan. 31, 1881; *Kopper v. Willis*, Gen. Term, N. Y. Com. Pleas, Jan., 1881; *Thompson v. Lacy*, 3 B. & Ald. 283; *Parkhurst v. Foster*, 1 Salk. 387; *Cromwell v. Stevens*, 3 Abb. N. S. 35; *Willard v. Reinhardt*, 2 E. D. Smith, 148; 25 Wend. 653; 9 Humph. 179; *Stewart v. McCready*, 24 How. Pr. 62; *Lima v. Dwinnelle*, 7 Alb. L. J. 44; *Wintermute v. Dwinnelle*, 5 Sandf. 147; *Manning v. Wells*, 9 Thomp. 746; *Stewart v. Seymour*, Anthon's Law Student, 51; *Mower v. Feathers*, 61 N. Y. 64.) Any person who comes to a hotel or an inn, recognized and admitted to be such, for the purpose for which such hotel or inn is kept, and whom the landlord is bound to receive, becomes a guest, and the landlord's liability as insurer attaches unless he has relieved himself therefrom by posting the notices required by law. (*Mowers v. Feathers*, 61 N. Y. 34; *Richmond v. Smith*, 8 B. & C. 9; *Bennett v. Ditson*, 5 Term R. 273; *Grennell v. Cook*, 3 Hill, 488; *Kopper v. Willis*, Gen. Term, Com. Pl., Daily Reg., Jan. 31, 1881; *Ingoldsby v. Wood*, 36 Barb. 452; 33 N. Y. 577; *Catlin v. Hobbs*, 12 Mich. 52; Story on Bail. 423, § 476; Humph. [8th ed.] 179; *Burgess v. Clements*, 4 M. & S. 206; *Fell v. Knight*, 8 M. & W. 269; *Farnsworth v. Packard*, 1 Stark. 249; Edw. on Bail. [1st ed.] 394; *Ambler v. Skinner*, 7 Robt. 561; *Caly's Case*, 8 Coke, 63, note b; *Walbrook v. Griffith*, Moore, 876; *Warbroke v. Griffin*, 2 Brown & Golds. 254; Bacon's Abr., Inns and Innkeepers, chap. 5.) A contract, as to length of stay and prices, made with one who comes to an inn for the purpose for which an inn is kept, does not alter the legal rights or liabilities of landlord or guest, and is not a special contract. (*Piper v. Manny*, 21 Wend. 282; *Richmond v. Smith*, 8 B. & C. 9.) Plaintiff was competent to testify as to the question of the value of the

Opinion of the Court, per MILLER, J.

articles lost. (*Merrill v. Grinnell*, 30 N. Y. 594; *Smith v. Hill*, 22 Barb. 656; *Watson v. Bauer*, 4 Abb. Pr. 273; *Joy v. Hopkins*, 5 Denio, 84; *Derby v. Gallup*, 5 Minn. 134; *Smith v. Frost*, 32 N. Y. Supr. Ct. 87; *Clark v. Baird*, 9 N. Y. 196.) The question whether the relation of innkeeper and guest existed between the plaintiff and the defendants was one of fact, and having been found in favor of the plaintiff, will not be reviewed by this court. (*Hall v. Pikey*, 100 Mass. 495; *Jolie v. Cardinal*, 35 Wis. 118; *McDonald v. Edgerton*, 5 Barb. 560.)

MILLER, J. The plaintiff claims to recover in this action the value of property stolen while a guest at the hotel of the defendants in the city of New York. The findings of the referee show that the plaintiff was an inmate of the defendants' hotel from November, 1873, until June, 1874, and that the articles lost were taken from the rooms occupied by plaintiff in the month of March, 1874; that the husband of the plaintiff, General Hancock, was an officer in the United States army, and that in November, 1873, he applied for rooms and board at the defendants' hotel for himself and family; that after some conversation between the defendants and said Hancock, in regard to himself and family remaining at defendants' hotel, in which certain rooms, in a private house adjoining said hotel, which the defendants were then using in connection with the same, were mentioned, it was said by General Hancock that he expected to remain until the following summer, provided every thing was satisfactory, and provided also he was not sooner ordered elsewhere on military duty; that the defendants offered the terms which they would take for said rooms, which terms General Hancock accepted on the understanding that he should continue to occupy them until the next following spring or summer, provided every thing was satisfactory, and provided also he was not sooner ordered away on military duty. The referee also found that General Hancock and family, immediately prior to their going to the hotel of the defendants, had been boarding at another hotel in New York

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city, and had no permanent home anywhere ; that prior to the year 1873 and ever since that time the home of General Hancock has been wherever his military head-quarters were, and that such head-quarters during that time have been at different places. The referee refused to find, as requested by the defendants, that any substantial agreement had been made by General Hancock as to the length of time he and his family should occupy said rooms.

We think that the finding of the referee as to the understanding under which General Hancock and family came to the defendants' hotel is sufficiently supported by the evidence, and that his refusal to find that there was any substantial contract as to time between the parties was fully justified. It appears very distinctly by the proof that no specified time was absolutely fixed or agreed upon for the stay of General Hancock and family at the defendants' hotel, and no express contract was made in regard to the same. According to the evidence the General and family had a perfect right to leave at any time after the contract was made, and were not bound to remain for even an entire day, the moment General Hancock was dissatisfied he and his family had a right to leave the hotel, so also if ordered elsewhere he had a right to leave. It rested with him in these contingencies to do and act exactly as he pleased. It was a fluctuating agreement, depending upon his own will and caprice, and it cannot be said that the minds of the parties met as to any specific time whatever. The defendants could not have recovered damages by reason of his leaving at any moment. As an officer in the army his duty might at any time have called him away to some distant and remote place ; and individually he had the right to say when he should go without consulting the defendants. Really and actually he was but a transient guest, who had the right to come and to go whenever he pleased. Officers of the army and navy, and soldiers and sailors, who have no permanent residence which they can call home, may well be regarded as travelers or wayfarers when stopping at public inns or hotels, and to make them chargeable as mere boarders it should be shown

satisfactorily that an explicit contract had been made which deprived them of the privileges and rights which their vocation conferred upon them as passengers or travelers. General Hancock and the defendants evidently had this in view in the conversation which took place between them in regard to the former's stay at the latter's hotel. The fact that General Hancock was subject to marching orders at any moment, and that this contingency was expressly provided for, makes a wide distinction between the case at bar and one which possesses no such features. This difference and the circumstances connected with it should be sufficient to take this case out of the ordinary rule which applies between an innkeeper and a permanent boarder, and fully sustains the rule we have laid down without disturbing the relationship or obliterating the distinction which exists between a guest and a boarder. In view of the evidence presented and the findings of the referee, we think the defendants are bound within the reason of the rule under which an innkeeper is held liable for the goods and property of his guest. As a soldier, General Hancock was unable to acquire a permanent home, and by reason of his profession was obliged to live temporarily and for uncertain periods of time at different places and with innkeepers and others who make provision for the entertainment of guests and travelers. He was necessarily a transient person liable to respond to the call of his superiors at any moment and to change the locality of himself and family. The defendants kept a hotel or inn taking care of transient guests, some staying for a longer, some for a shorter period. General Hancock, for himself and family, paid for their meals the same as other transient guests, and by express agreement they were at liberty to leave at any time they saw fit. Under these circumstances no reason exists why they should not be protected as well as the other travelers or guests at the hotel. It is very evident, from the testimony, that no absolute and express contract was made for the hiring of the rooms and the board of General Hancock and his family for any stipulated period of time, and the most that can be claimed, on the part of the appellants, is

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that it was a question of fact for the consideration of the referee and for him to determine whether General Hancock and family were travelers and guests or boarders. On the one hand, as already stated, General Hancock was a transient person and could not depend upon remaining for any particular period of time at any place; he was without any permanent residence or home, and it positively appears that he made no arrangement for any permanent occupation of the rooms at defendants' hotel. On the other hand separate apartments were kept for boarders and for transient persons by the defendants, and the General and his family were registered among the former, but it does not appear that he knew this fact, and hence it cannot well be claimed that he had grounds for supposing and understood that he and his family were boarders and not guests. The authorities hold beyond question that the fixing of the price does not make the party a boarder. (See *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 169; *Walling v. Potter*, 35 Conn. 183.) The fair intendment from the evidence is that General Hancock did not go to defendants' hotel under a contract hiring the rooms for a season, but that he was a transient person who had the right to leave at any moment, the same as any other guest. Regarding the evidence as it stands, and conceding the facts in reference to the question whether General Hancock and family were travelers and guests or boarders, there would seem to be but little question that the weight of the testimony is in favor of the proposition that they were travelers or wayfarers and that there was no hiring of the rooms of the defendants for a season or a specified time. Even if there might have been a doubt as to whether there was a hiring for a term, as the referee has found in favor of the plaintiff upon this question, we cannot disturb the finding and it should be upheld.

In considering the question discussed it should not be overlooked that the St. Cloud Hotel was kept as a public inn in every sense and was clearly distinguishable from a boarding-house; its proprietors did not claim that it was a boarding-house, and there

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is no evidence to show that it was considered in that light, and neither the fixing of the price nor the conversation had in reference to the probability of General Hancock and family remaining for a period of time could alter or change its true character. Hotels in modern days are differently conducted from what they were in times gone by. Furnishing rooms at a fixed price and meals at prices depending upon the orders given at the usual hotel rates constitutes a material difference in the system of keeping hotels from that which formerly existed. The defendants conducted a restaurant in connection with their hotel, at which meals were furnished in accordance with fixed prices. General Hancock and family, after the first month of their stay at the defendants' hotel, and at the time the property in question was stolen, took their meals at the restaurant, for which they paid prices for each meal the same as other guests or travelers. So far then as this is concerned they must be considered the same as other guests. Certainly they were not boarders in the sense in which that term is understood. As they were guests at the restaurant at the time when the loss occurred and paid as such, it is difficult to see upon what principle it can be urged that they were boarders because their lodgings were in the hotel or in rooms connected therewith. To sustain such a rule would make them boarders in part and guests in part. This would be unreasonable, the more so in this case, because the proof does not establish a contract for any fixed time.

'The appellants' counsel claims that the referee having found that General Hancock and family for several years prior to going to the St. Cloud Hotel had been boarding at another hotel in New York city, therefore they were not travelers or passengers, but were at their home and were citizens of New York. As we have already seen, the General being a soldier, and liable to be called to distant and remote places by order of the government, and thus obliged to change his head-quarters, had no residence in the city of New York, and when stopping at a hotel awaiting orders, with the right to leave at any moment, he must be regarded as a transient person the same as any other traveler or passenger. At common law the

innkeeper was compelled to furnish lodgings and entertainment for travelers and passengers, and he was bound to protect the property they brought with them and was liable if it was lost or injured. (See *Mowers v. Fethers*, 61 N. Y. 34; 19 Am. Rep. 244.) "The length of time that a man is at an inn makes no difference, whether he stays a week or a month or longer: so although he is not strictly transient, he retains his character as a traveler," but he may, by a special contract to board and sojourn, make himself a boarder, and being such the innkeeper is not liable. (Story on Bail., § 477; 2 Pars. on Contracts, 150, *et. seq.*) The decisions have not been entirely harmonious as to whether fixing in advance the price to be paid and the length of the stay has the effect in law to constitute such person a mere boarder or lodger, and to deprive such visitor of the character of guest. There are numerous decisions in the books of recent date which hold that where there is a special agreement as to time and price that does not absolutely disturb the relationship of innkeeper and guest. (*Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 169; *Walling v. Potter*, 35 Conn. 183; *McDaniels v. Robinson*, 26 Vt. 316; see also *Parker v. Flint*, 12 Mod. 255.) These cases indicate a tendency in the courts to conform the old rule to the changes made in hotel keeping in modern times.

We are referred by the learned counsel for the appellants to numerous cases to sustain the doctrine he contends for, among which are: *Vance v. Throckmorton* (5 Bush [Ky.], 41); *Manning v. Wells* (9 Hump. [Tenn.] 746); *Hursh v. Byers* (29 Mo. 469); *Pollock v. Landis* (36 Iowa, 651); *Lusk v. Belote* (22 Minn. 468), and others. A careful examination of these authorities discloses that in each of them it is very apparent that the relation of landlord and guest did not exist, and that the party who claimed damages of the innkeeper was in every case a boarder beyond any question, and that in most, if not in all of them, there was a special contract as to time and price which established that relationship. None of them are analogous to the case at bar, and in none of them was it made to

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appear that the plaintiffs' occupation was of a character which rendered them liable, upon call, to remove from their location and go elsewhere. Besides, the proof shows in all these cases a special contract which could not be terminated, as in the case at bar, at any moment, or which was liable to be concluded by the orders of a higher authority. The cases cited are therefore not in point, and cannot control the decision of the question considered.

It must be borne in mind, in considering the question discussed that the referee refused to find that there was any substantial contract for plaintiff's stay at the hotel and that he found differently and hence it may well be held, in entire harmony with the cases last cited, that the fixing of the price did not change the relationship of the parties as innkeeper and guest. The common-law rule which fixes the liability of an innkeeper to his guest is a salutary one and imposes no needless hardship upon him, and it should be administered according to its spirit without regard to technical distinctions. The statute (Chap. 421, Laws of 1855), was enacted for the benefit of the innkeeper and if complied with furnishes full and ample relief from the liability incurred under the common law. The defendants here failed to comply with the statute by their neglect to conform to its provisions and have no ground to complain when made amenable for such failure. It is no hardship in the law that they are called upon to answer for losses occasioned by their own neglect. It is to be presumed that every innkeeper sufficiently guards the hotel under his charge so as to protect its inmates from the depredations of criminals. When they fail to do this and carelessly omit to notify the inmates where their valuables can be fully protected, no reason exists in the law or in justice why they should not respond for losses attributable to their own remissness. The defendants here were manifestly wrong in failing to comply with the statute cited and as they have not brought themselves within any rule of law which exempts them from the liability incurred by innkeepers generally in their relation to travelers and guests,

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we are unable to see why they should be relieved in the case at bar.

The findings of the referee and his refusals to find were clearly right and unless some error exists in the rulings as to the evidence they should be sustained.

We have given due attention to the other questions raised and can discover no ground of error which would authorize a reversal of the judgment.

The judgment should, therefore, be affirmed.

RUGER, Ch. J., RAPALLO and DANFORTH JJ., concur,
ANDREWS, EARL and FINCH JJ., dissent.

Judgment affirmed.

MARY BYRNE, an Infant by Guardian, etc., Respondent, v. THE
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, Appellant.

To bring a case within the provision of the General Railroad Act (§ 7, chap. 282, Laws of 1854), requiring that a bell shall be rung or whistle sounded upon the engine of a train approaching "the place where the railroad shall cross any traveled public road or street," it is not sufficient that the *locus in quo* has been so dedicated to the public, by the owners, as to constitute it a public street; to bring it within the requirement, the street must be traveled as well as public.

Where, therefore, plaintiff was injured at a point where defendant's road crossed an alley, which was not traveled or capable of being traveled save at one end, and such travel did not cross the railroad; *held*, that the omission of the statutory signals was not negligence.

Byrne v. N. Y. C. & H. R. R. R. Co. (28 Hun, 438), reversed.

(Argued October 9, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 16, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Mem. of decision below, 28 Hun, 438.)

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

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The owners of certain lands in the city of Troy, had laid them out into city lots, streets and alleys; lots had been sold and some of the streets had been worked by the city. Plaintiff was struck by a car attached to a train moving backward on defendant's road at a point where said road crossed an alley so laid out. The alley was north and south, at the north end it runs to a creek over which there is no bridge, and consequently there is no travel upon the alley on the north side of the railroad or crossing the road. The negligence complained of was the omission to ring the bell or blow the whistle of the engine drawing the train as it approached the crossing.

Further facts appear in the opinion.

Esek Cowen for appellant. The mere making of a map, on which streets and alleys are laid down is not of itself a dedication of these streets and alleys to the public without an acceptance. (*Holdam v. Cold Spring*, 21 N. Y. 474; *Suspension Bridge Co. v. Bachman*, 66 id. 261.) And this is the case even where lots have been sold, abutting on the streets so laid out. (*Fonda v. Borst*, 2 Keyes, 48; *Badeau v. Mead*, 14 Barb. 328; *Grinnell v. Kirtland*, 6 Daly, 356; affirmed, 68 N. Y. 629; *City of Oswego v. Oswego Canal Co.*, 6 id. 257; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 id. 474.) If the alley was not a highway, and a traveled highway, the court was in error in charging that the defendant was bound to give the statutory signals. (*Cordell v. N. Y. C. & H. R. R. R.*, 64 N. Y. 535.)

R. A. Parmenter for respondent. On the evidence, the question of the plaintiff's contributory negligence and of defendant's negligence was plainly one of fact for the jury. (14 Hun, 322; 83 N. Y. 620; *Ernst v. H. R. R. R. Co.*, 35 id. 9; *Maginnis v. N. Y. C. & H. R. R. R. Co.*, 52 id. 215; *Webber v. N. Y. C. & H. R. R. R. Co.*, 58 id. 451; *Salter v. U. & B. R. R. Co.*, 59 id. 631; *Culhane v. N. Y. C. & H. R. R. R. Co.*, 60 id. 137; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Cordell v. N. Y. C. & H. R. R. R. Co.*, id. 535; *Haycroft v. L. S. & M. S. R. Co.*, id. 636; *Casey v. N.*

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Y. C. & H. R. R. R. Co., 78 id. 518, 524.) The question of the alleged contributory negligence on the part of the plaintiff was also one of fact for the jury. (*Hill v. N. Y. C. & H. R. R. R. Co.*, 2 Weekly Dig. 94; *Morrison v. N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 643; *Sheehy v. Burger*, 62 id. 558; *O'Mara v. Hudson R. R. R. Co.*, 38 id. 445; *Dickens v. N. Y. C. R. R. Co.*, 1 Keyes, 23; *Hart v. H. R. B. Co.*, 9 Weekly Dig. 536; 80 N. Y. 622.) If there was any evidence tending to show negligence on behalf of the parent, which would have been sufficient to defeat the action when established, it was still a question of fact for the jury under all the evidence. (*Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317; *McGarvey v. Loomis*, 63 id. 107.) The defendant being guilty of negligence in the management of powerful and dangerous machines, had no right, under the law, to exact of this plaintiff a higher degree of caution, care and deligence than could be reasonably expected from a child of her age. (*O'Mara v. H. R. R. R. Co.*, 38 N. Y. 449; *Sheridan v. B'klyn & N. R. R. Co.*, 36 id. 42, 43; *Mowery v. Central City R'y*, 51 id. 667; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 252; *Thurber v. H. B. M. & F. R. R. Co.*, 60 id. 336; *McGarry v. Loomis*, 63 id. 107; *Fallon v. Central Park, etc.*, 64 id. 13; *Haycroft v. L. S. & M. S. R. R. Co.*, 2 Hun, 491; 64 N. Y. 636-7; *Casey v. N. Y. C. & H. R. R. R. Co.*, 78 id. 518; *Douling v. N. Y. C. & H. R. R. R. Co.*, 90 id. 679; 83 id. 620; *Casey v. N. Y. C. & H. R. R. R. Co.*, 6 Abb. N. C., 104.) In case of such a collision the law does not exact from the traveler mathematical certainty in the measurement of time, speed and distance. (*Stackus v. N. Y. C. & H. R. R. R. Co.*, 9 Weekly Dig. 441; *Justice v. Lang*, 52 N. Y. 323; *Dolan v. D. & H. C. Co.*, 71 id. 285; *Briggs v. N. Y. C. & H. R. R. R. Co.*, 72 id. 26; 83 id. 620.) The dedication, acceptance and user of the alley are complete and should not be disturbed to enable a railroad company to escape the legal consequences of its negligence. (*Bridges v. Wyckoff*, 67 N. Y. 130; *Niagara Falls Susp. B. Co. v. Bachman*, 66 id. 261; *Head v. City of Brooklyn*, 60 id. 248; *Taylor v. Hopper*, 2 Hun, 646;

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Matter of Ingram, 4 id. 495; *Holedale v. Trustees Village of Cold Spring*, 21 N. Y. 474.) Having invoked the decision of the court, the defendant is estopped from complaining of the result, unless it appears there is not sufficient evidence to support it. (*Armes v. Dauchy*, 82 N. Y. 443; *Dillon v. Cockroft*, 90 id. 649.)

RAPALLO, J. The sole question submitted to us in this case is whether at the time the plaintiff was injured, the alley, or that portion of it where the injury occurred, was a "traveled public road or street," before crossing which the defendant was bound to give the statutory signals.

We are clearly of opinion that it was not. Assuming that the *locus in quo* had been so dedicated to the public by the owners of the land as to constitute it a public street, which the local authorities would have had the right to improve and put in use as such, that is not sufficient to bring it within the statute.

The statute is evidently intended for the protection of persons crossing the track of the railroad, when traveling on the public street or road, and it was held in the case of *Cordell v. New York Central & Hudson R. R. Co.* (64 N. Y. 535) that according to the plain language of the statute, the street or road, to bring it within the requirement of the statute, must be both *traveled* and *public*. In the present case the alley at the place of the accident was not traveled or capable of being traveled. It extended on paper from Madison street in the city of Troy, northerly to the South side of the Poestenkill creek. It was crossed about midway by the track of the railroad. The only evidence of any travel upon it was, that at the south end of it, where it entered Madison street, there was a store called the Iron Works store, and that teams would enter the alley from Madison street to receive goods from the store, and would then turn around before reaching the track of the railroad; and the father of the plaintiff, who had lived many years in the immediate locality, testified that there never was any travel upon the alley, except south of the railroad track, that when they got to the track they turned;

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consequently there was no travel across the railroad track at that place, nor was there any occasion for such travel, as there was no bridge across the creek over which travelers could pass, and it does not appear that any use was ever made of the alley, except to receive goods on teams from the store south of the track.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

HORACE ANDREWS et al., Respondents, v. THOMAS M. TYNG, Appellant.

The General Term of the Supreme Court has no authority on appeal to determine the amount of unsettled damages; at least where no facts are found below upon which an estimate as to the true amount can be made.

Accordingly *held*, where on trial before a referee in an action for attorney's services wherein the defendant set up a breach of the contract of employment on the part of plaintiffs, and the referee found the breach, but allowed only nominal damages, and where the General Term decided this to be erroneous and that defendant was entitled to substantial damages, that it was error for the General Term to fix the damages; that it only had authority to order a new trial, so that the amount of damages might be determined by a trial court.

Plaintiffs agreed to prosecute two actions for defendant for a specified sum as retaining fee, an allowance for each day's attendance before a referee, and a percentage of any recoveries. Because of non-payment of the retaining fee, and the daily allowance, plaintiffs, as the referee found, "refused to be bound by the contract," but they continued thereafter as attorneys of record and acted in that relation, and as such, without the knowledge of their client and in hostility to his interests stipulated to vacate an order in his favor, granted in one of said actions. *Held*, that plaintiffs' contract was an entire one; that conceding because of the non-payment of fees, they might refuse to act, they could waive the default, and having so done, by acting as attorneys thereafter, and their action being wrongful and adverse to their client, they were not entitled to compensation for any services in said suit.

94	16
162	459
162	460
94	16
164	877

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Before plaintiffs' refusal to be bound a judgment against defendant had been rendered in the other of said actions. *Held*, that plaintiffs could only recover under and according to the terms of the contract.

(Submitted October 10, 1883 ; decided November 20, 1883.)

APPEAL from a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of the plaintiffs, entered upon the report of a referee.

The complaint stated that the plaintiffs were lawyers, and set forth, in substance, two causes of action : *First*. An indebtedness for services rendered upon defendant's retainer in the prosecution of two suits — one against Baird and others and another against Fields and others. *Second*. A debt due them as assignees of Delevan for money paid by him for the defendant.

The defendant pleaded a special agreement by which the plaintiffs were "to use their best efforts" in his behalf in said actions, in consideration that he would pay them \$300 as retainers — \$10 for each day's actual attendance before a referee, ten *per centum* upon the amount of any recovery, and all costs and allowances that might be recovered and paid in those suits; that they failed to keep their agreement, and while acting as his attorneys combined to injure him, "and in the interest of his opponents" abandoned the actions intrusted to them to prosecute "to his injury more than \$10,000," and asked judgment accordingly. By reply these allegations are controverted.

The issues were tried before a referee. He found the employment of the plaintiffs upon terms substantially as claimed by the defendant; that prior to July 26, 1870, he paid them \$175, and on that day, after repeated, unavailing demands for further payments of "retainers and compensation on this agreement," they, by reason of defendant's failure to meet those demands, "refused to be further bound by the agreement, and withdrew from it." By that time the Fields suit had gone into judgment against the plaintiffs therein. The suit against Baird and others was still pending, but they also obtained judgment

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on the 25th of October, 1870. Afterward the plaintiff therein — defendant here — acting in his own person, made a motion upon the merits to vacate and set aside that judgment, and succeeded. But on the 2d of February, 1871, the plaintiffs, as his attorneys of record, but without his knowledge or consent, stipulated in writing that the order of January 25, obtained by him, be vacated and set aside, and the motion dismissed. On the 21st of February, Baird's attorneys, on notice to these plaintiffs as attorneys of record, but without personal notice to the plaintiff in that suit, obtained an order allowing \$10,000 additional costs, and entered judgment accordingly. This also, on application of this defendant, was vacated by the court, and the order of January 25, 1871, restored as of the date of its entry. The referee held, as matter of law, that the giving of consent by the plaintiffs, whereby the order theretofore obtained by the defendant (plaintiff in the Baird suit) was set aside, was wrongful, and the defendant entitled to recover from them his damages sustained thereby, and those damages he assessed at six cents. He allowed the plaintiffs for all services in the Baird suit (except attendance before the referee).. \$750 00

For eight attendances at which there was no hearing, \$10 each..... 80 00

For five at which proceedings were had, \$50 each, 250 00

\$1,080 00

For all services in the Fields suit, except attendance before referee \$700 00

For ten such attendances, \$10 each..... 100 00

For fifteen attendances, when the trial went on, \$50 each..... 750 00

\$1,550 00

And for the second cause of action as claimed by the plaintiff — in the aggregate upon all claims, \$3,197.54. After judgment upon the referee's report the defendant appealed to the Supreme Court, where an order was made that the judg-

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ment be "in all things reversed for error of law and fact and a new trial granted," unless the plaintiffs * * * stipulate that it be reduced in amount to the sum of \$2,697.54, and in that case it be affirmed. The plaintiffs stipulated and judgment was modified accordingly. The defendant appeals to this court.

Matthew L. Harney for appellant. The contract was an entirety, and the service was single; it was an executory contract, of which full performance was necessary, before any cause of action accrued for the value of any services rendered under it. (*Bathgate v. Haskins*, 59 N. Y. 533; *Place v. McIlvain*, 38 id. 96; *London v. Tazing District*, 14 Otto, 771.) As the contract was never rescinded it was in force till the plaintiffs saw fit to abandon it. (*Clark v. Mayo*, 4 Comst. 538.) This was a case for exemplary damages. (Sedgwick on Damages [6th ed.], 35, 554.)

William H. Andrews for respondents.

DANFORTH, J. The order of the General Term is an emphatic protest against the injustice of the decision of the referee, and we think the error upon which it stands is not cured by the condition imposed upon the plaintiffs. The answer charges a serious breach of duty on their part—the referee substantially sustains the allegation, but, in the opinion of the General Term, he failed to carry out his finding to a legitimate conclusion. He awarded a nominal sum only to the defendant, and the condition imposed by the General Term requires in its stead the allowance of substantial damages. The plaintiffs accede to this, and in one sense the defendant is not aggrieved, for the judgment is thereby diminished in his favor. Yet, we think, it should not stand against his appeal. The sum allowed by the referee is criticised as wholly inadequate, while that fixed by the Supreme Court is much less than the claim of the defendant. There is no fact found upon which an estimate as to the true amount can be made, and the case con-

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tains no evidence. Hence a difficulty is presented as the learned court below also found. They concluded that injustice had been done to the defendant, and that the award by the referee should have been more liberal — precisely how much more could not be stated, but it was said to be “at least \$500.” The uncertainty is thus apparent, and we can find no authority by which that court can determine the amount of unsettled damages; therefore, as the error did, in its opinion, require a reversal of the judgment, it had no alternative, but to grant a new trial in order that the amount of these damages might be fixed by a trial court. (*Whitehead v. Kennedy*, 69 N. Y. 462.)

The facts actually found furnish abundant materials for another view of this case. The rights of the attorneys corresponded to their duties. They were bound not only by retainer, but by special contract, to serve until the close of the litigation upon which they entered, unless sooner legally discharged. Their contract was an entire one. It may be conceded that for the non-payment of fees they might refuse to act for their client, or might submit the excuse to the court, and be discharged, yet they might also waive his default. In this case, although on the 26th of July, 1870, “they,” as the referee says, “refused to be bound by the contract,” they continued attorneys of record, and acted in that relation as late as the 2d of February, 1871, when, without the consent or knowledge of their client, but still as his attorneys, they vacated an order theretofore obtained in the cause. That the order so vacated was one in his favor, and they, in vacating it, acted in a manner hostile to him and his interest, cannot alter the fact that what they did was done by them as his attorneys, and could have had no effect, except so done. It was an act in the cause, and the plaintiffs should not be permitted to say that in doing it they were not acting in it, and for their client. If that relation existed at that time, no cause of action was made out by the plaintiffs, for that depended upon the withdrawal of the plaintiffs on the 26th of July, and if the act was wrongful — adverse to their client, and to the advantage of the other side,

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they could have no right to compensation for any services in the suit. The law does not tolerate prevarication in the service of an attorney, or permit him to use his position as such to the prejudice of the party for whom he professes to act. The referee declares that the plaintiffs not only declined to substitute other attorneys in either of the suits without being first paid or secured," but availed "themselves of the position that their refusal to grant a substitution left them in, as attorneys of record," to destroy the advantage which the defendant, by his own effort and without their aid, had obtained. One cannot, after assuming the relation of attorney to a client, throw it off and resume it at pleasure, and to his client's prejudice, and again discard it to his own advantage. Here then was not only the obligation of a contract, but a duty which the law implied — a continuous one while the relation of attorney and client existed. The duty was violated, not by negligence, but willfully, and under circumstances, which both courts hold entitle the client to indemnity. For services in the Baird suit, therefore, as the case is now before us, the plaintiffs could rightfully recover nothing. They are left in the attitude of wrong-doers, and cannot be permitted to measure the damages resulting from their own wrong. (*Chatfield v. Simonson*, 92 N. Y. 210.) If, however, the undertaking of the plaintiffs in the two suits is regarded as separable, they might recover for services in the one against Fields, but only according to the contract. Judgment had been entered in that action before the plaintiffs refused to be bound by the agreement, and their damages should have been assessed according to its terms. Upon another trial a different state of facts may be disclosed. Without further reference, therefore, to this claim; upon the grounds before mentioned, we think the appeal must prevail.

The judgment of the General Term, and that entered upon the report of the referee, should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgments reversed.

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77 AD 456 LEVI NICHOLS, Appellant, v. GEORGE DREW, Impleaded, etc.,
Respondent.

Where two causes of action upon contract are joined in the same action a demurrer to the complaint, upon the ground that all of the defendants are not affected by both causes, lies at the instance of a defendant who is so affected. The objection is not to the misjoinder of parties, but of causes of action, and so the rule that a defendant against whom a good cause of action is pleaded may not demur because too many are joined does not apply.

(Argued October 10, 1888: decided November 20, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the first Tuesday of January, 1880, which reversed an order of Special Term overruling a demurrer to plaintiff's complaint, interposed by defendant Drew, and which directed judgment for said defendant on the demurrer.

The complaint herein contained two counts. The first count alleged that the defendants Drew, Young and McLane, in 1873, jointly became indebted to the plaintiff, on contract, in the sum of \$1,218.12, no part of which had been paid except as thereafter stated; that the defendants nominally failed, and afterward Drew and Churchill fraudulently contrived together to cheat and defraud plaintiff out of said demand; that in carrying out such fraudulent purpose, Churchill proposed to pay twenty-five cents on the dollar for an assignment of said claim, and, with the intent of inducing the plaintiff to make such assignment, falsely and fraudulently made certain false and material representations, particularly set forth in the complaint, knowing them to be false, and thereby induced the plaintiff to assign; that the money paid, in fact, belonged to Drew, or was advanced by Churchill for his benefit, and the claim so assigned was afterward given up by Churchill to Drew, or held by him for Drew's benefit. The count concludes with an allegation that, by reason of the premises, the plaintiff has sustained damages to the amount of said claim,

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with interest, less the amount paid by Churchill. The second count alleges that it repeats all the allegations contained in the first count, and further alleges that, before said claim was assigned to Churchill, the defendants, Drew and Young, represented that there was money in the hands of R. & P. D. K. Saunders, a law firm in Buffalo, to the amount of \$252, and verbally assigned said money to the plaintiff to apply on his said demand, and directed and requested the plaintiff to sue said firm for the money; that, in pursuance thereof, the plaintiff brought suit, and was defeated and compelled to pay costs in said action to the amount of \$150; that he never recovered any part of said money, but whatever moneys were in the hands of said Saunders were paid out by them in pursuance of the directions of Drew, McLane and Young, or one of them, and that the money so represented to be in the hands of said Saunders was not assigned to Churchill, but was reserved to the plaintiff. The relief demanded is that the plaintiff recover from Drew, Young and McLane the sum of \$1,218.12, with interest, less the amount paid by Churchill; that he also recover, as damages, the costs and expenses incurred by him in the action against Saunders; that the assignment to Churchill be adjudged fraudulent and void, and that Churchill and Drew, for their fraud and deceit, be adjudged to pay the plaintiff \$2,000 damages, and general relief is also prayed for.

The demurrer was upon the ground, among others, that two causes of action were improperly joined, one being for tort, and the other on contracts, and both not affecting all the parties.

Thomas Corlett for appellant. On demurrer all reasonable intendment will be indulged in in support of the pleading demurred to. (*Lorillard v. Clyde*, 86 N. Y. 384, 389.) So that as against Drew, who demurs, the first count shows a perfect cause of action against him on contract jointly with Young and McLane, to recover the board bill, and also to remove the obstruction in the way of its recovery, to-wit: the fraudulent assignment. (*Litell v. Sayre*, 7 Hun, 485.) The right to re-

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move a fraudulent obstruction, and to recover in the same action, is well established. (*Phillips v. Gorham*, 17 N. Y. 270; *Lattin v. McCarty*, 41 id. 107; *Bracket v. Wilkinson*, 13 How. Pr. 102; *Smith v. Schulting*, 14 Hun, 52; *Strasburg v. Mayor, etc.*, 87 N. Y. 452, 454, 456; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 id. 357; *Sternberger v. McGovern*, 56 id. 12; New Code, § 484; *Wiles v. Suydam*, 64 N. Y. 173.) The fact that the plaintiff, after demanding appropriate relief, makes a further demand against the defendants, Drew and Churchill, for their fraud is not of the slightest consequence, for no demurrer will lie to the prayer for relief. (*Kingsland v. Stokes*, 25 Hun, 107, 110; *Mackey v. Auer*, 8 id. 180; *Walker v. Spencer*, 45 N. Y. Sup. Ct. 71; *Pierson v. McCurdy*, 61 How. Pr. 134; *Neftel v. Lightstone*, 77 N. Y. 96; *Conaughy v. Nichols*, 42 id. 83; *Graves v. Wait*, 59 id. 156; *Ledwich v. McKim*, 53 id. 308; *Rose v. Terry*, 63 id. 613, 614; *Sparman v. Keim*, 83 id. 245; *Olcott v. Carroll*, 39 id. 436.) Each count of the complaint states a good cause of action against the defendant Drew. Both counts are upon contract, and each count equally affects the defendants Drew, Young and McLane, and hence the demurrer could not be sustained. (*Dempsey v. Willett*, 16 Hun, 264, 265; *Zabriskie v. Smith*, 3 Kern. 322; *Olcott v. Carroll*, 39 N. Y. 436; *Barber v. Morgan*, 51 Barb. 116; Code of Civ. Proc., §§ 488, 490, 499, 542; *Nellis v. DeForest*, 16 Barb. 61, 65; *Osgood v. Toole*, 60 N. Y. 475; *Schwartz v. Oppold*, 56 How. Pr. 156; *Marston v. Gould*, 69 N. Y. 220, 221; *Richtmyer v. Richtmyer*, 50 Barb. 55; *Fish v. Hose*, 59 How. Pr. 238.)

C. F. Tabor for respondents. The first count in the complaint is a count in fraud. (*Barnes v. Quigley*, 59 N. Y. 267; *McMichael v. Kilmer*, 76 id. 40; *Whiteside v. Hyman*, 10 Hun, 218.) The second count is clearly one in contract. (*Keep v. Kaufman*, 56 N. Y. 332.) The second count does not allege a cause of action against all of the defendants. This is good cause for demurrer. (*Mann v. Marsh*, 21 How. 392; *Cornell v. Mayor, etc.*, 3 Weekly Dig. 534.) The second count

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did not affect either of the defendants McLane or Churchill. (*Burroughs v. Totstevan*, 75 N. Y. 572; *Bonnell v. Wheeler*, 3 T. & C. 561; *Van Liew v. Johnson*, 6 id. 537; *Schnitzer v. Cohen*, 7 Hun, 665; *Barton v. Spies*, 5 id. 60; *Jackson v. Brookins*, id. 533; *Gardner v. Ogden*, 22 N. Y. 340; *Bonell v. Griswold*, 68 id. 294.) Even though the first cause of action be regarded as one to set aside the assignment to Churchill, and to recover the debt of Drew, McLane & Young, the joinder with the second was improper, and the demurrer was well taken for that reason. (*Van Liew v. Johnson*, 6 T. & C. 648; *Cook v. Horwetz*, 10 Hun, 586; *Wiles v. Suydam*, 64 N. Y. 179.) A complaint demanding a rescission and damages should show an offer to restore upon the part of the plaintiff. (*Dubois v. Hermance*, 56 N. Y. 673; *Cobb v. Hadfield*, 46 id. 537; *Van Liew v. Johnson*, 6 T. & C. 650; *Lewan v. Julien*, 6 Weekly Dig. 508; *Ross v. Titter*, 6 Hun, 284; *Gould v. Cayuga B'k*, 86 N. Y. 75.) Plaintiff, instead of availing himself of the leave granted by the General Term to amend his complaint, having appealed to this court, has risked his case upon a mere question of pleading. (*Keep v. Kaufman*, 56 N. Y. 333.) Every interment on a demurrer is against the pleader. (*People v. Suprs. of Ulster*, 34 N. Y. 269; *Cook v. Warren*, 88 id. 42.)

FINCH, J. The demurrer interposed took the specific objection that the first cause of action pleaded was in tort, while the second was on contract, and so there was a misjoinder of causes of action. The General Term sustained the objection. It is now claimed that both counts were on contract, and the first is construed to allege a debt against Drew, McLane and Young, which is sought to be recovered, while Churchill is introduced as a party, and his and Drew's fraud alleged, solely to set aside the assignment to Churchill, and restore the plaintiff to the position of a creditor of the firm. But the pleading plainly avers a fraud perpetrated by Drew and Churchill, whereby the plaintiff suffered damage to the amount of seventy-five per cent of his debt. The loss of the debt as damages

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suffered, and not its recovery upon the contract, is the substance of the pleading.

But if this were doubtful, and the first cause of action could be deemed *ex contractu*, and aimed solely at a recovery of the debt, a difficulty remains. An objection was stated in the demurrer that the second cause of action did not affect the defendant Churchill. Although it repeats the allegations of the first count, it goes on to show, and does clearly show, that Churchill was in no manner affected by it; for it avers that the moneys said to be in the hands of Saunders were not included in the assignment to Churchill, but reserved therefrom, and that the false statement of moneys in the hands of Saunders and their assignment to plaintiff was before the latter's assignment to Churchill. Now the only pretense for making Churchill a party, upon the theory that both causes of action are on contract, is to set aside the assignment to him. But the Saunders money, or so much of the debt of the firm as that represented, is distinctly averred not to have been assigned to him, so that, taking as true, as we are bound to do, the allegations of the complaint, it distinctly appears that to the second cause of action Churchill was an entire stranger, and in no manner affected by it. The Code provides (§ 484), for the joinder of causes of action, naming in nine subdivisions those which may be united, but applying further to those in each class the limitations that they must be consistent with each other, and, except as provided by law, must affect all the parties. The exception mainly relates to mortgage foreclosures, as to which special provisions exist. The answer made to this difficulty is that no demurrer lies for making too many parties, and for such excess the party against whom a good cause of action is pleaded cannot demur. But the objection is not for a misjoinder of parties. It is for a misjoinder of causes of action. Those arising on contract and affecting all the parties may be joined. Those arising on contract but inconsistent with each other, or not affecting all the parties, cannot be joined, and the defect may be reached by demurrer. The General Term was, therefore, right in its conclusion.

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We are at liberty to allow the plaintiff to plead anew or amend upon such terms as are just, or if need be, to direct a severance of the action. (Code, § 497.) No necessity for such severance is suggested, but it seems proper to allow the plaintiff to amend upon terms which are just. The judgment of the General Term should be affirmed, with leave to the plaintiff to serve an amended complaint within twenty days from notice of the entry of this judgment, upon payment, within the same time, of costs from the service of the demurrer, including those on appeal to the General Term and to this court.

All concur.

Judgment accordingly.

RACHEL SAULSBURY, Appellant, v. THE VILLAGE OF ITHACA,
Respondent.

Where, by the charter of a municipal corporation, it had power to repair streets and sidewalks and "to prevent the incumbering or obstructing the same in any manner," held, that it was liable for injuries occasioned by an omission on its part to repair or remove a sidewalk constructed without its authority, which had been, for a sufficient length of time to charge it with notice, in so defective a condition as to be dangerous for travel.

(Argued October 15, 1883; decided November 20, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, reversing a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 24 Hun, 12.)

This action was brought to recover damages for injuries sustained by plaintiff by falling into an excavation in one of defendant's streets.

The material facts are stated in the opinion.

F. E. Tibbetts for appellant. Municipal corporations are required to keep their streets and sidewalks in proper repair and free from dangerous obstructions, and are liable for injuries resulting from their neglect so to do. (*Conrad v. Vil-*

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lage of Ithaca, 16 N. Y. 158; *McCarthy v. City of Syracuse*, 46 id. 194; *Hinds v. City of Lockport*, 50 id. 236; *Sewell v. City of Cohoes*, 75 id. 45; *Davenport v. Luckman*, 37 id. 568; *Diveny v. City of Elmira*, 51 id. 506; *Clifford v. Dam*, 81 id. 52; Dillon on Municipal Corporations [1st ed.], 571; Cooley on Torts, 625, 626.) Defendant having officially recognized the street, both by resolution and by working on it, is estopped from questioning that it is a public street. (*Sewell v. City of Cohoes*, 75 N. Y. 45; 7 Gray, 338; 13 Vt. 424; 45 id. 99.) Defendant will not be permitted to escape liability simply because it took no action in the premises. (*Hyatt v. Village of Rondout*, 44 Barb. 395; 41 N. Y. 619; *Hinds v. City of Lockport*, 50 id. 239; Dillon on Municipal Corporations [1st ed.], § 753.) It is not essential who built the walk, nor whether it was built by the order, or under the supervision of the municipal officers; the only question is, did the corporation allow it to be used for public travel. (*Requa v. City of Rochester*, 45 N. Y. 129, 134; *Niven v. City of Rochester*, 76 id. 621; *James v. City of Portage*, 48 Wis. 677; *Tuck v. City of Ripon*, 52 id. 200; *Oliver v. City of Kansas*, 69 Mo. 79; *Beatty v. Town of Duxbury*, 24 Vt. 155; *Johnson v. City of Milwaukee*, 46 Wis. 571; *Potter v. Castleton*, 53 Vt. 440, 441; *State v. Compton*, 2 N. H. 518; *Lafayette v. Larson*, 73 Ind. 367; *Urquhart v. City of Ogdensburg*, 18 Weekly Dig. 261; *Bloomington v. Bay*, 42 Ill. 508; *Hiller v. Village of Sharon Springs*, 16 Weekly Dig. 12.) This sidewalk, in the condition the referee finds it was at the time of the accident, was an obstruction in one of the public streets of the village of Ithaca, which it was the duty of the board of trustees to order removed after notice. (*Hume v. Mayor, etc.*, 74 N. Y. 275; *Clifford v. Dam*, 81 id. 53; *Oliver v. City of Kansas*, 69 Mo. 79; *Todd v. City of Troy*, 61 N. Y. 506.)

S. D. Halliday for respondent. If there was no defect in the surface of this walk, and a man should walk off from it in broad daylight and receive injuries, he could not have recovered,

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because he failed to put his eyes to that use which is required of persons of ordinary care, and because he negligently failed to avoid defects which were plainly visible. (61 Barb. 437.) A notice to defendant, either actual or constructive, was necessary. (59 N. Y. 660; 45 id. 129.) Defendant is not responsible or liable for a wrongful exercise of discretion by its board of trustees in deciding that there ought or ought not to be a walk built at any particular spot, nor can the court exercise a discretion which is confided solely to the board of trustees. (*Urquhart v. City of Ogdensburg*, 81 N. Y. 67; 50 id. 238; 32 id. 489; 5 Lans. 16; 1 Denio, 595; 3 Duer, 406; 3 N. Y. 467; 9 id. 169.)

DANFORTH, J. The place of the accident was a public street in the village of Ithaca. Its sidewalk was uneven upon the surface and slanting; it extended over and so bridged an excavation, three or four feet deep, at the bottom of which was a pile of sharp cornered stones, of such shape that a person falling upon them would receive serious injury. There was no railing or other guard upon either side of the walk. It does not appear to have been built by the defendant, but had been in this condition for about one year, and the defendant had notice of it a long time before the 13th of June, 1879. On that day the plaintiff, while traveling on foot over the walk, without fault on her part and by reason solely of its defective and unguarded condition, was precipitated from it upon the stones below. She was injured and brought this suit. The above facts were found by the referee, and he directed judgment in her favor. The General Term has reversed this decision upon the sole ground that the defendant neither built nor ordered the construction of the sidewalk.

In this was error. By charter the defendant's trustees are made commissioners of highways, and among other things are empowered to construct, repair or discontinue its streets and sidewalks, "and prevent the incumbering or obstructing the same in any manner." (Laws of 1864, chap. 257; Laws of 1871, chap. 140; Laws of 1875, chap. 287.) The

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order appealed from assumes that if the building of the walk had been a corporate act the defendant would have been liable. That is well settled. (*Conrad v. Trustees of Village of Ithaca*, 16 N. Y. 158.) In such case it would be sufficient to show that the work was done by its authority. If the structure which caused the injury is erected on its land, or on premises which it controls, by permission of its officers, the same result must follow. An equal liability is incurred when by omission to repair or compel the removal of a walk constructed without their authority, but of the existence of which they have notice, a way dangerous for travel is allowed to stand within the limits of its streets. In such a case it is their duty to repair or remove it, and with money in hand or power to procure it, there is no ground for irresponsibility. One or the other of these things must be done. It is true that whether a municipal corporation shall build, or permit to be built, a sidewalk on any of its streets, is matter of discretion not to be regulated by the courts, yet when a sidewalk is built with or without its permission, it becomes responsible for its condition and bound so long as it exists to keep it in order. This duty is ministerial and not judicial. (*Hines v. City of Lockport*, 50 N. Y. 239; *Hyatt v. Village of Rondout*, 44 Barb. 395; 41 N. Y. 619; *Vogel v. Mayor, etc.*, 92 id. 10; 44 Am. Rep. 349.) In this case, therefore, it can make no difference how the walk came into existence, if the corporation, with notice, permitted it to be used for public travel. By the act of the builder, and acceptance or acquiescence in the building of it on the part of the defendant's officers, they had control over it, and it became the property of the village as completely as if it had been put in position by the village itself. The principle upon which the above cases were decided uphold this proposition, and the case of *Requa v. City of Rochester* (45 N. Y. 129; 6 Am. Rep. 52), to the same effect, is so like the case before us as to make it decisive in favor of the appellant.

That of *Urquhart v. Ogdensburg* (91 N. Y. 67; 43 Am. Rep. 655) is relied on by the respondent. There the sidewalk needed no repair and the complaint related to the plan of its

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construction. As that was within the judicial discretion of the defendant, negligence could not be predicated of it.

The learned counsel for the respondent also seeks to sustain the order of the General Term upon grounds not noticed by them, alleging that the evidence failed to disclose either defects in the walk or proper care on the part of the plaintiff in using the walk. It is a sufficient answer to these positions if there was evidence, which, in some reasonable aspect, might sustain the finding of the referee. In such a case it will not be reviewed by this court. An examination of the testimony shows that there is nothing obviously wrong in his conclusions and we find no reason for interfering with them. The merits were well considered, and the record discloses no legal error committed by the referee. His decision stands upon sound policy and is a proper recognition of the duty of public officers to have regard to the business intrusted to them, upon the performance of which the safety of the citizen depends.

The order of the General Term should, therefore, be reversed, and the judgment entered upon the report of the referee affirmed.

All concur, except RAPALLO and FINCH, JJ., not voting.

Order reversed and judgment affirmed.

BENJAMIN. WRIGHT, as Receiver, etc., Appellant. v. ELBERT
NOSTRAND et al., Respondents.

In an equity action brought to set aside alleged fraudulent conveyances made by a judgment debtor, the defendant is not entitled to a jury trial. The court may frame issues and direct them to be tried before a jury, but this is in its discretion, and its determination is not the subject of review. Where the alleged fraudulent conveyances were of the debtor's real estate to his wife, and the judgment set them aside, *held*, an objection to such judgment, that it did not provide for the wife's right of dower, could not be raised on appeal; that the remedy, if any, was by motion.

It seems that such dower right is not affected by the judgment.

In such an action the judgment debtor was called as a witness for the defendants and gave material evidence. *Held*, that his evidence, taken in

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supplementary proceedings was admissible, not only against him as an admission, but also as against all of the defendants, for the purpose of affecting his credibility by showing conflicting statements.

A witness for plaintiff testified to the pendency of an action against the judgment debtor at the time of the conveyances, and to an attempt, upon the part of his attorney, to delay the recovery of judgment therein. *Held*, that a refusal to strike out such evidence was not error; that the evidence was proper as showing motive; and that the debtor might fairly be presumed to have had notice of the proceedings on the part of his attorney.

It seems that it is competent for a receiver, appointed in supplementary proceedings, to bring an action either to set aside and annul alleged fraudulent conveyances of his real estate by the debtor, and for a reconveyance of the property by the fraudulent grantee, or to set aside the conveyances as a cloud on title so as to subject the property to levy and sale on execution.

In the former case, to maintain the action, it is necessary for him to show such proceedings, in relation to his appointment as receiver, as vest in him title to the real estate; in the latter it is simply necessary to show his appointment and that he rightfully represents the judgment creditor, as whose representative he brings the action, so that the judgment will be a bar against any one claiming under the original judgment.

An order, made upon the application of the judgment creditor, authorizing the prosecution of the action, by the receiver, is sufficient for this purpose.

Accordingly *held*, in an action of the latter character, commenced when the Code of Procedure was in force, under an order of the court authorizing it, no question of title being involved, it was not necessary to show a filing and recording of the order appointing the receiver, as required by said Code, in order to vest in the receiver title to the debtor's real estate, nor was it necessary to show, where the real estate was situated in the city of New York, a compliance with the provisions of the act of 1813 (§§ 159, 160, chap. 86, 1 R. L. 1813), in regard to recording transfers of title in the register's office in that city.

In such an action a question simply affecting the regularity of the appointment of the receiver may not be raised by defendants.

Proceedings supplementary to execution and for the appointment of a receiver are not special statutory proceedings, such as require affirmative proof of the facts conferring jurisdiction upon the court or officer acting when questioned collaterally, but simply proceedings in the action, and such acts are entitled to all the presumptions of regularity belonging to proceedings in courts of general jurisdiction.

An order, therefore, in such a proceeding, appointing a receiver, made by the court or judge authorized to make it, is to be presumed regular until annulled in a direct proceeding; and if the order recite facts giving jurisdiction, it is *prima facie* evidence of the existence of those facts.

Rockwell v. Merwin (45 N. Y. 166), *Dubois v. Cassidy* (75 id. 298), *Sackett v. Newton* (10 How. Pr. 561), distinguished.

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It seems that the issue and return of an execution *nulla bona* is essential to the validity of an order in supplementary proceedings, as well as to the right to institute an action to reach equitable assets.

An execution, however, although it be so defective that it is subject to be vacated and set aside on motion, may not be treated as void when questioned in collateral proceedings, where the defects are amendable, or where all the essential facts necessary for the direction and protection of the sheriff are stated in the execution, or are plainly inferable from the facts stated.

An execution was entitled on the outside "N. Y. Superior Court" with the names of the parties. It was directed to the sheriff of the county of New York, and stated in the body thereof that judgment was rendered March 2, 1874, in "the Superior Court," in favor of plaintiff and against defendant, as appeared by the judgment-roll on file in the office of the clerk of said court; that said judgment was docketed in the county of New York, and that there was "on the 4th day of March, 1874, the sum of \$604.95 actually due thereon." The sheriff was directed to collect that amount with interest from the date the judgment was rendered. *Held*, that the execution was not void and could not be questioned collaterally; that it was fairly inferable therefrom that the judgment described was rendered in the Superior Court of the city of New York and was for the amount asserted to be due thereon; and that the return of the sheriff of *nulla bona* was evidence of the exhaustion of legal remedies, sufficient to authorize the institution of an action to reach property of the judgment debtor.

Plaintiff was appointed receiver under a judgment in favor of a bank. *Held*, the fact that the bank had ceased to be a corporation by reason of the appointment of a receiver in bankruptcy of its assets did not invalidate plaintiff's appointment; that it was competent for the receiver of the bank to institute proceedings in its name, to collect the judgment and to procure or sanction the appointment of a receiver of the assets of the judgment debtor.

Supplementary proceedings were instituted in April, 1875; plaintiff was appointed receiver therein in February, 1878. It was not shown that the proceedings were adjourned from time to time. *Held*, that the court would not presume a loss of jurisdiction from the omission to show regular adjournments.

The plaintiffs, in whose favor the judgment upon which the supplementary proceedings were based was rendered, composed the firm of P. & Co.; three of the four members of the firm had become insolvent, and assignees in bankruptcy of their assets had been appointed. *Held*, that said assignees were not authorized to take the firm property, and so their appointment had no effect upon the ownership of the judgment.

(Submitted October 15, 1883; decided November 20, 1883.)

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APPEAL from order of the General Term of the Superior Court of the city of New York, entered upon an order made March 8, 1881, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, and ordered a new trial. (Reported below, 15 J. & S. 441.)

The nature of the action and the material facts are stated in the opinion.

A. Wakeman for appellant. In the execution issued on the Arnold judgment the teste and the direction to return to the office of the clerk of the city and county of New York were mere surplusage. (*Carpenter v. Simmons*, 28 How. 12, 16; 1 Robt. 360; *Fake v. Edgerton et al.*, 5 Duer, 681; *Butterfield v. Howe*, 19 Wend. 86.) The sheriff was bound to return the execution according to the requirements of the statute. (*Wilson v. Wright*, 9 How. 459.) The defects in the execution are all amendable and should be amended by the court, *nunc pro tunc*, or disregarded. (*Abels v. Westervelt*, 15 Abb. 230; *Park v. Church*, 5 How. 381; *Carpenter v. Simmons*, 28 id. 12; 1 Robt. 360; *Inman v. Griswold*, 1 Cow. 199; *Chichester v. Conde, impl'd, etc.*, 3 id. 39, 40; *Ross v. Luther*, 4 id. 158; *Scudder v. Snow*, 29 How. 95; *Bucklin v. Chapin*, 53 Barb. 488; *Kennedy v. Thorpe*, 3 Abb. [N.S.] 131; *Fake v. Edgerton et al.*, 5 Duer, 681; *Cutler v. Rathbone*, 1 Hill, 204; *Peck v. Tiffany*, 2 N. Y. 451; *James v. Gurley*, 48 id. 163; *Hill v. Haynes*, 54 id. 153; Code of Procedure, §§ 169, 170, 173, 174, 176; Code of Civil Procedure, §§ 721, 722, 723; *Douglas v. Haberstro*, 14 N. Y. W'kly Dig. 311.) None of the defendants, except the judgment debtor, Elbert Nostrand, can object to the defects in the execution, or to any irregularity in the supplemental proceedings. (*Abels v. Westervelt*, 15 Abb. 230; *Grosvenor v. Hunt*, 11 How. 355; *Berry v. Riley*, 2 Barb. 307; *Oakley v. Becker*, 2 Cow. 454; *Renick v. Orser*, 4 Bosw. 384; *Bacon v. Cropsy*, 7 N. Y. 195.) The judgment debtor waived the defects in the execution by appearing and submitting to examination in supplemental proceedings, without objection, by submitting to

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the appointment of a receiver of his property, and by failing to appeal from the order appointing such receiver. (*Bingham v. Disbrow*, 14 Abb. 251; *Viburt v. Frost*, 3 id. 119; *Diddell v. Diddell*, id. 167; *Union B'k of Troy v. Sargent*, 35 How. 87; *Green v. Bullard*, 8 id. 24; *People v. Globe Mut. L. Ins. Co.*, 60 id. 82; *Hobart v. Frost*, 5 Duer, 672; *Quinn v. Floyd*, 7 Robt. 157; *Bucklin v. Chapin*, 53 Barb. 488; *Bell v. Vernooy*, 18 Hun, 125; *People v. Brenham*, 3 id. 666; *Greason v. Keteltas*, 17 N. Y. 491; *Macy v. Nelson*, 62 id. 638; *Vose v. Cockcroft*, 44 id. 415; *Baird v. Mayor, etc., N. Y.*, 74 id. 382.) The order appointing the plaintiff receiver in the Arnold action was properly received in evidence. (*Roosevelt v. Gardinier*, 2 Cow. 463; *Jackson v. Jackson*, 3 id. 73; *Starr v. Francis*, 22 Wend. 633; *Gould v. Root*, 4 Hill, 554; *Spencer v. Barber*, 5 id. 568; 2 Wend. 625; 6 Paige, 371; 3 id. 195; *Jackson v. Shaffer*, 11 J. R. 513; *Hartwell v. Root*, 19 id. 345; *Jackson v. Cole*, 4 Cow. 587; *Smith v. Jones*, 20 Wend. 192; *Doughty v. Hope*, 3 Denio, 149; *Ross v. Bedell*, 5 Duer, 462; *Sperling v. Levy* 1 Daly, 95; *Arent v. Squire*, id. 347; *Nelson v. People*, 23 N. Y. 293-297; *Leland v. Cameron*, 31 id. 115; *People v. Carpenter*, 24 id. 86; *McAndrew v. Railway*, 34 id. 511-513; *De Forrest v. Farley*, 62 id. 628.) The proceedings supplementary to execution under the judgment of the Loaners' Bank were in all respects legal and proper and were properly entitled in the action in which the judgment was recovered, because they were proceedings in that action. (*Wegman v. Childs*, 41 N. Y. 159-163; *Dresser v. Van Pelt et al.*, 15 How. 19; *B'k of Genesee v. Spencer*, id. 412; *Gould v. Torrance*, 19 id. 560; *Catlin v. Gottlier et al.*, 57 N. Y. 363-373; *Wines v. Mayor*, 70 id. 613; *Rockwell v. Merwin*, 45 id. 166; *B'k of Charleston v. Emerick*, 2 Sandf. 718; *Underwood v. Sutcliffe*, 10 Hun, 453; *Kennedy v. Norcott*, 54 How. 87; *Brockway v. Brien*, 37 id. 270; *Allen v. Starring*, 26 id. 57.) As this action was in equity, and equitable relief only sought, it was clearly in the discretion of the judge whether he would send any of the questions involved to a jury for a trial. (*Wheelock*

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v. *Lee*, 74 N. Y. 495, 500; *Davis v. Morris*, 36 id. 569; *Coleman v. Dixon*, 50 id. 572; *McCarty v. Edwards*, 24 How. 236.) The supplemental examinations were admissible as declarations of a co-conspirator to show the execution, extent and effect of the common purpose to defraud. (*Menlin v. Lyon*, 49 N. Y. 661; *Cuyler v. McCartney*, 40 id. 221; *Dewey v. Moyer*, 72 id. 70.) The notice of the application for the appointment of the plaintiff receiver under the Arnold judgment was sufficient. (*Ashley v. Turner*, 22 Hun, 226; *Leggett v. Sloan*, 24 How. 479; *People, ex rel. Fitch, v. Mead*, 29 id. 360.) The order appointing the plaintiff receiver was duly filed and recorded in the office of the clerk of the city and county of New York; there was no necessity of filing it in the office of the register. (Old Code, § 298; *Rockwell v. Merwin*, 45 N. Y. 166, 168.) There was no necessity of a conveyance of the property sought to be reached to the receiver. (*Charatanqua Co. B'k v. Risley*, 19 N. Y. 369.) The direction in the judgment that the plaintiffs in the original judgments, or their successors, shall be at liberty to sell the property described in the complaint upon executions to be issued upon their respective judgments, is proper. (*Seaman v. Schaeffer*, 76 N. Y. 606, 607.) As the buildings at 112 Clinton street were erected in 1839, even if, as Mrs. Nostrand swears, they were built with her money, which she received from her father, they became the absolute property of her husband by operation of law. (2 Kent's Com. [3d. ed.] 133-135; *Martin v. Martin*, 1 N. Y. 473; *Wood v. Genet*, 8 Paige, 137; *Glann v. Younglove*, 27 Barb. 480; *Little v. Willets*, 37 How. 481; *Ryder v. Hulse*, 24 N. Y. 372; *Westervelt v. Gregg*, 10 id. 202; *Stokes v. Macken*, 62 Barb. 145; *Woodbeck v. Hoocus*, 42 id. 66; *King v. O'Brien*, 1 J. & S. 49; *Ferman v. Orser*, 5 Duer, 476.) Where a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance. (2 R. S., chap. 1, part 2, § 51,

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art. 2; *Donovan v. Sheridan*, 5 J. & S. 256.) A voluntary conveyance of property by a debtor through a third person to his wife is fraudulent, as against his creditors, even though there is no fraudulent intent. (*Coles v. Tyler*, 65 N. Y. 73; *Mohawk B'k v. Atwater*, 2 Paige, 54; *Carpenter v. Roe*, 10 N. Y. 280; *Babcock v. Eckler*, 24 id. 623; *Dygert v. Remerschnider*, 32 id. 648; *Curtis v. Fox*, 47 id. 300.) The voluntary conveyance of this property by Nostrand to his wife was fraudulent, even as against subsequent creditors. (*Savage v. Murphy*, 34 N. Y. 508; *Case v. Phelps*, 39 id. 164.) To invalidate a voluntary conveyance, as against creditors, it is not necessary that the debtor be, or believe himself to be, insolvent at the time of the grant. It is sufficient if his solvency is contingent upon the stability of the market in the business in which he is engaged, and it is only where a voluntary conveyance is made in good faith, with no intent to defraud the grantor's creditors, that it will be upheld by proof that when made the grantor retained an estate to pay his debts. (*Carpenter v. Roe*, 10 N. Y. 227; *Fox v. Moyer*, 54 id. 125; *Ford v. Johnson*, 7 Hun, 563; *Warner v. Blakeman*, 43 N. Y. 487.)

Edward P. Wilder for respondents. An action in equity of this nature cannot be maintained until the remedy at law is exhausted. (*Crippen v. Hudson*, 13 N. Y. 161; *Dunlevy v. Tallmadge*, 32 id. 457.) The execution was defective because it did not intelligently refer to the judgment, stating the court and county where the judgment-roll was filed, the names of the parties, the amount actually due, and the time of docketing in the county to which the execution was issued. (*Clark v. Miller*, 18 Barb. 269; Code of Procedure, §§ 289, 290; *Clearwater v. Brill*, 63 N. Y. 627; *Watson v. Fuller*, 6 Johns. 282; *Todd v. Botchford*, 56 N. Y. 517; *Douglas v. Whiting*, 28 Ill. 362; *Brem v. Johnson*, 70 N. C. 566; *Ins. Co. v. Halleck*, 6 Wall. 556; *Anon.*, Loft, 184; *Albee v. Ward*, 8 Mass. 79; *Hall v. Moor*, Add. [Penn.] 376; *Toof v. Bentley*, 5 Wend. 276; *Farr v. Smith*, 9 id. 338.

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Woodcock v. Bennett, 1 Cow. 738-9; *Newson v. Newson*, 4 Ired. 381; *Beazley v. Dunn*, 8 Rich. 345; *Blanks v. Rector*, 24 Ark. 496; *Herman on Executions*, § 89; *Park v. Church*, 5 How. 381; *Douglas v. Haberstro*, 88 N. Y. 618; *Laws of 1847*, chap. 280, § 57; *Park v. Church*, 5 How. 381; *Healy v. Preston*, 14 id. 20; *Fake v. Edgerton*, 3 Abb. 229; *People v. Seaton*, 25 Hun. 305; *People v. Bowe*, 20 id. 547; *Douglas v. Haberstro*, 88 id. 618; *Farnham v. Hildreth*, 32 Barb. 277; *Cutler v. Rathbone*, 1 Hill, 204; *Laws of 1847*, chap. 470, § 43; *Hutchinson v. Brand*, 9 N. Y. 208; *Dominick v. Ecker*, 3 Barb. 19; *Jackson v. Hunter*, 4 Wend. 585; *Borland v. Stewart*, id. 568; *Jennings v. Carter*, 2 id. 446; *Herman on Executions*, §§ 68, 69; *Crocker on Sheriffs* [2d ed.], § 284; *Earl v. Camp*, 16 Wend. 562; *Cornell v. Barnes*, 7 Hill, 35; *James v. Gurley*, 48 N. Y. 163; *Field v. Chapman*, 13 Abb. 325; *Field v. Hunt*, 24 How. 466; *Howard v. Sheldon*, 11 Paige, 558; *Dunlevy v. Tallmadge*, 32 N. Y. 462.) The error in admitting the order appointing plaintiff receiver was quite sufficient to justify the General Term in reversing the judgment of the Special Term. (*Josuez v. Conner*, 7 Daly, 448; *Old Code*, §§ 298, 408; *Wegman v. Childs*, 44 Barb. 403; *Coope v. Bowles*, 28 How. 10; 42 Barb. 87; *Sackett v. Newton*, 10 How. 561; *De Comeau v. People*, 7 Rob. 498, 501; *Dubois v. Cassidy*, 75 N. Y. 298; *Rockwell v. Merwin*, 45 id. 166; *Vandenburg v. Gaylord*, 7 N. Y. Weekly Dig. 136; *Kemp v. Harding*, 4 How. Pr. 178; *Dorr v. Noxon*, 5 id. 29; *Barker v. Johnson*, 4 Abb. Pr. 435; *Todd v. Crook*, 4 Sandf. 694-5; *Kennedy v. Weed*, 10 Abb. 62; *Crippen v. Hudson*, 13 N. Y. 161.) The complaint should have been dismissed at Special Term, on the ground that the order appointing plaintiff receiver confers upon him no title or capacity to bring this action, because not recorded in the office of the register of New York city and county. (*Old Code*, § 298; *Rockwell v. Merwin*, 45 N. Y. 166, 168; 8 Abb. [N. S.] 330, 334; *Scroggs v. Palmer*, 66 Barb. 505; *Laws of 1813*, chap. 86; *People, ex rel. Kingsland, v. Palmer*, 52 N. Y. 83; *McKenna v. Edmundstone*, 91 id. 231; *Whipple v. Christian*, 80 id. 523.) The "exten-

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sion" of the appointment of the plaintiff as receiver, under and for the benefit of the judgment recovered by the Loaners' Bank was clearly a nullity. (*Amore v. Lamothe*, 7 N. Y. Weekly Dig. 212; *McCulloch v. Norwood*, 58 N. Y. 566; *Bain v. Illuminated Tile Co.*, 7 Weekly Dig. 335-6 [Part 3]; *Huguenot B'k v. Studwell*, 74 N. Y. 621; Code, § 1900; *Boyd v. Harold*, 18 N. B. R. 433; *In re Ettinger*, 18 id. 222; *Dygert v. Remerschnider*, 32 N. Y. 649; *Phillips v. Wooster*, 36 id. 412; *Babcock v. Ecker*, 24 id. 630; *Reade v. Livingston*, 3 Johns. Ch. 500; *Wells v. O'Connor*, 27 Hun, 426; *Corporation v. Gordon*, 12 Weekly Dig. 570; *Warden v. Browning*, 12 Hun, 497-500; Old Code, § 289; 2 R. S. 367, § 24; *Neilson v. Neilson*, 5 Barb. 565.) The only evidence of fraud in these transfers lies in the fact itself that they were made, which is not enough. (*Dygert v. Remerschnider*, 32 N. Y. 637, 636; *Carr v. Breese*, 81 id. 584.) The mere circumstance of Mary Nostrand having allowed the property to stand for so many years in her husband's name is not significant, in view of the fact that it was purchased prior to the passage of the acts enlarging the privileges of married women, and before it had become customary for such women to hold lands in their own names. (*Garrity v. Haynes*, 53 Barb. 296; *Syracuse v. Wing*, 85 N. Y. 421; *Jaeger v. Kelly*, 52 id. 274; *Dimon v. Hazard*, 32 id. 77; *Babcock v. Eckler*, 24 id. 623; *Prewitt v. Wilson*, 19 N. B. R. 461.) Her equitable claims upon this property are as great as those of these creditors, who have parted with nothing on the faith of it. (*Smith v. Smith*, 17 Weekly Dig. 81; *Syracuse v. Wing*, 20 Hun, 207, 208-209; affirmed, 85 N. Y. 421; *Berdell v. Berdell*, N. Y. Daily Reg., January 20, 1880; 2 Monthly Law Bulletin, 32; *Genesee B'k v. Mead*, 16 Weekly Dig. 486.) The court erred in admitting in evidence, as against the defendants, John R. Cypert and Mary A. Nostrand, and under their specific objection and exception, the testimony of Elbert Nostrand, in supplementary proceedings, in actions to which they were not parties. (*Bennett v. McGuire*, 58 Barb. 636; *Cuyler v. McCartney*, 40 N. Y. 221.) It was error to deny

the defendants a trial by jury of the question of fraud in the transfers, and of the amount due on the Arnold judgment. (*Davis v. Morris*, 36 N. Y. 569; *Lattin v. McCarty*, 41 id. 112; *Bradley v. Aldrich*, 40 id. 510; *Hudson v. Caryl*, 44 id. 555; *People v. Albany, etc., R. R. Co.*, 57 id. 161; *Freeman v. Atlantic Ins. Co.*, 13 Abb. 124; *Levy v. Brooklyn F. Ins. Co.*, 25 Wend. 687; *Wheelock v. Lee*, 74 N. Y. 500; *Page v. Cameron*. 11 Weekly Dig. 478; *Compton v. Compton*, id. 325.)

RUGER, Ch. J. This is an equity action brought by the plaintiff, as receiver of the property and effects of the defendant, Elbert Nostrand, to set aside certain alleged fraudulent conveyances theretofore made by said Nostrand to the other defendants herein, and subject the property therein described to the lien of certain judgments.

The plaintiff claimed to derive his authority as such receiver by virtue of his appointment under proceedings supplementary to execution taken in three several actions wherein judgments had been obtained against said Elbert Nostrand. The trial resulted in a judgment against the defendants for the relief demanded in the complaint, but, upon appeal to the General Term, that judgment was set aside and a new trial ordered, solely upon the ground of alleged irregularities in the proceedings under which the plaintiff was appointed receiver. From this order the plaintiff appeals to this court, upon giving the usual stipulation for judgment absolute.

It is competent for the defendants, in support of this order, to urge any other material errors committed upon the trial, even though they were not mentioned by the General Term as among the reasons for its order of reversal.

The appellant has brought to our attention a number of alleged errors in addition to those relied on by the General Term, which he claims entitled him to a reversal of the judgment rendered by the trial court.

So far as such questions are of sufficient gravity to merit consideration, they will be noticed before proceeding to the

discussion of the grounds upon which the new trial was ordered.

First. The refusal of the court to award to the defendants a trial by jury upon their request therefor was not erroneous. The action, being solely an equitable one, to remove a cloud upon the title of the property sought to be subjected to the liens of the judgments mentioned in the complaint, did not authorize the defendants, or either of them, to claim as matter of right a trial of the issues therein by a jury. In such cases the court may, in its discretion, frame issues and direct them tried before a jury, but whether they will do so or not is purely a matter of discretion, and their determination of that question is not the subject of review. (*Colman v. Dixon*, 50 N. Y. 572.)

Second. The claim that the judgment originally entered in the action did not provide for a right of dower claimed to exist in favor of the defendant, Mary A. Nostrand, in the property alleged to have been fraudulently conveyed to her, and that it was in other respects erroneous in form, were questions not properly before the General Term and cannot be raised upon the appeal here. The remedy of the defendants, if any such irregularities exist, is by motion and appeal from the order thereon, if the proper relief is not granted. (*Beardsley Scythe Co. v. Foster*, 36 N. Y. 561; *Binsse v. Wood*, 37 id. 526; *Buck v. Remsen*, 34 id. 383.) The alleged dower right of Mary A. Nostrand is not affected by the judgment rendered herein.

Third. The objection made to the admission of the evidence of the defendant Elbert Nostrand, taken on proceedings supplementary to execution, was not tenable. The defendant Nostrand had been called as a witness for the defendants on the trial and had given material evidence for them. The deposition received in evidence was competent not only for a limited purpose as against him as an admission in the case made by one of the defendants therein, but was also competent at the time it was offered as against all of the defendants, for the purpose of affecting the credibility of the testimony given by such witness for them on the trial.

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Fourth. The motion made to strike out the evidence of James W. Culver, a witness produced by the plaintiff, was properly denied. The witness had testified as to the pendency of the Arnold action against Elbert Nostrand at the time of the alleged fraudulent conveyance, and the attempt of said Nostrand's attorney to delay the recovery of a judgment therein. This motion was made upon the ground that it did not appear that Nostrand knew that the case had been placed on the short cause calendar for trial. We think the evidence was proper as tending to furnish a motive, on the part of the debtor, for placing his property beyond the reach of his creditors, and that it may fairly be presumed that a person has notice of the proceedings of his own attorney in a cause where he is the sole defendant.

Fifth. The questions arising upon the evidence affecting the merits of the action, which have been referred to in the brief of defendant's counsel, do not seem to us to be sufficiently serious to require particular mention. The conclusions reached by the trial court upon the facts in the case are supported by the evidence therein, and its conclusions of law predicated thereon do not seem to be open to any legal exception.

It remains, therefore, only to consider the various questions raised affecting the validity of the appointment of the plaintiff as receiver under the several judgments described in the complaint, and his right to represent the plaintiffs in such judgments. In the consideration of these questions it should be borne in mind that the plaintiff is not here asserting any title to, or interest in, either the real or personal property of the judgment debtor by virtue of his appointment as receiver, but is simply seeking to remove a cloud upon the debtor's title to the property in question, so as to subject it to sale on execution. Such an action he is authorized to bring and maintain. (*Porter v. Williams*, 9 N. Y. 142.) Actions for a similar purpose could as well have been brought and maintained by the plaintiffs in the several judgments in their individual names, as through the intervention of a receiver; and the effect of judgments obtained by them in such actions would have been

the same as that attempted to be reached by a judgment in this action. (*Bostwick v. Menck*, 40 N. Y. 383; *Chautauque Co. Bank v. Risley*, 19 id. 369.)

It was competent for the receiver to have instituted either one of two actions in this case: He could have brought his action to set aside and annul the alleged fraudulent conveyance and demanded as his relief that the property so fraudulently conveyed should be reconveyed to him by the alleged fraudulent grantees; or he could bring the action which he has as the simple representative of the judgment creditors. In the former case he would have been obliged, in order to maintain his action, to show such proceedings relating to his appointment as receiver, as would have vested in him the title of the judgment debtor's real estate.

In this action it is unnecessary to show compliance with the provisions of sections 159 and 160 of chapter 86 of the Laws of 1813; or the closing paragraph of section 298 of the Code of Procedure. Section 298 authorizes the judge, by order, to appoint a receiver of the property of the judgment debtor in the same manner and with the like authority as if the appointment was made by the court. And it further provides, that upon the appointment, by an order of the judge, of a person as receiver, it shall be filed in the office of the clerk of the county where the judgment-roll in the action is filed, and that the clerk shall record the same in a book to be called a "book of orders appointing receivers of judgment debtors," and that the receiver so appointed shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order aforesaid. It is then specially provided, that before he shall be vested with any real property of such debtor, the order shall also be filed and recorded in the office of the clerk of the county where the real estate is situated, and also in the office of the clerk of the county in which the judgment debtor resides. It is thus quite apparent, from the reading of this section, that in a case where only personal property is concerned, or where the receiver is seeking simply to enforce the collection of a chose in action, it is not essential to show com-

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pliance with those requirements which are made the conditions of the transfer to the receiver of the title of the debtor's real estate. It required no interest in the debtor's property to authorize the receiver, any more than the judgment creditors, to maintain an action to collect a judgment from the debtor therein. The receiver is here seeking to enforce the collection of a debt due and owing to the creditors whom he represents, and upon recovering judgment herein he becomes entitled to sell upon execution such property of the debtor as is thus subject to the lien of the judgments which he represents. (*Bostwick v. Menck, supra.*)

The title to the property upon such a sale would not in any event pass through or depend upon any right therein possessed by the receiver, but would pass by a conveyance executed by the sheriff to the purchaser on such sale.

It is thus seen that the only interest which the defendants have, so far as this action is concerned, in the question of the regularity of the appointment of the plaintiff as receiver of the several judgments described in the complaint, is to see that he rightfully represents such plaintiffs, in order that they may not be subjected to other actions for the same cause, by other persons holding a superior right to that of the plaintiff. If the judgment in this case be determined to be a bar, as between the defendants herein, and any and all persons claiming an interest in the judgments, which are the basis of this action, then the defendants have secured all the protection to which they are entitled, as against the action of the plaintiff, so far as his right to institute it is concerned. This protection seems to have been secured to them, by the order of the court authorizing the prosecution thereof, made upon the application of the several judgment creditors, or those legally representing them, in each of the judgments described in the complaint, requesting that such action be prosecuted for their benefit. There can be no doubt but that such creditors would be stopped by an adjudication in this action.

While it is essential in any action brought by a receiver, that he should show an appointment as such receiver, from a

court or judge having jurisdiction to make it, it is yet not open to the party in a collateral proceeding, to raise every question relating to the validity of such appointment. (*Oakley v. Becker*, 2 Cow. 454; *Bacon v. Cropsey*, 7 N. Y. 195; *Dobson v. Pearce*, 12 id. 164.)

The defendant, in an action wherein the receiver was appointed, has been held to have waived, by his acquiescence in such appointment, any objections thereto founded upon irregularities in making the same. (*Tyler v. Willis*, 33 Barb. 328.) It was also held in the same case that it did not lie in the mouth of a third person, upon proceedings taken against him by such receiver, to collect a debt owing to the judgment debtor, to dispute the regularity of such receiver's appointment. To the same effect is the case of *Underwood v. Sutcliffe* (10 Hun, 453), *Morgan v. Potter* (17 id. 403).

The production and proof of an order, made by a court or judge authorized by law to make it, in proceedings supplementary to execution, reciting the facts necessary to give such court or judge jurisdiction to act in the proceedings, furnishes conclusive evidence of the regularity of such order, when questioned collaterally, and *prima facie* evidence of the existence of the facts necessary to confer jurisdiction. (*Rugg v. Spencer*, 59 Barb. 383; *Potter v. Merchants' Bank*, 28 N. Y. 652.) It was held in the case of *Wegman v. Childs* (41 N. Y. 159) that an action was pending in the court, wherein it was brought, until after the satisfaction of judgment therein; and that proceedings supplemental to execution and the appointment of a receiver were proceedings in the action. (See, also, *Pitt v. Davison*, 37 N. Y. 236, and *Gould v. Torrance*, 19 How. Pr. 560.) It was said in *Underwood v. Sutcliffe* (*supra*), that such proceedings were in the nature of an action, and although this may be so in some respects, it would seem to conform more with the meaning and intent of the statute to hold, as was decided in the cases above cited, that they are in the nature of new remedies or equitable rights, arising by force of the statute, in the actions in which the judgments were obtained.

This proceeding cannot, therefore, be termed a special statu-

tory proceeding before a court or officer of limited jurisdiction in the sense that the facts conferring jurisdiction of the matter must be affirmatively proved, whenever questioned in a collateral proceeding; but it is simply a new remedy in an action in which the court is possessed of general jurisdiction, and where the acts of the officers named are entitled to all the presumptions of regularity which belong to the proceedings of courts of general jurisdiction. (*Lounsbury v. Purdy*, 18 N. Y. 519.) It seems to us, therefore, that the orders of a court or judge authorized by law to act in such a proceeding must be presumed to be regular until annulled in a direct proceeding to review or set them aside; and that such orders, so far as they recite the facts necessary to confer jurisdiction upon the court or judge to move in the proceedings, furnish *prima facie* evidence of the existence of such facts. (*Foot v. Stevens*, 17 Wend. 483; *Chemung Canal Bank v. Judson*, 8 N. Y. 258; *Potter v. Merchants' Bank*, *supra*.)

The cases cited by the counsel for the respondent do not conflict with this view. *Rockwell v. Merwin* (45 N. Y. 166) held upon a demurrer to the complaint that the allegation therein that the plaintiff was duly appointed a receiver in supplemental proceedings was sufficient, and authorized proof on the trial of all the facts conferring jurisdiction. The method by which such proof was to be made was not considered or decided. In *Dubois v. Cassidy* (75 N. Y. 298) it was held that a receiver appointed in supplemental proceedings, before he could assert title to the real estate of the judgment debtor, must show a compliance with the provisions of section 298 of the Code of Procedure, which are expressly made conditions upon which his right to take title to real estate depends. *Sackett v. Newton* (10 How. Pr. 561) involved simply the question as to whether the issue and return of an execution *nulla bona* was a condition to the maintenance of a creditor's bill by a receiver.

Considered in the light of the views we have expressed we think the several orders appointing the plaintiff as receiver of the property of Elbert Nostrand under each of the several

judgments described in the complaint sufficiently proved the regularity of such appointment, and the authority of the officer making them, to entitle the plaintiff to maintain this action.

No question is raised but that these orders were each regularly recorded with the clerk of the county of New York, as required by section 298 of the Code of Procedure, nor but that such receiver executed all of the security required by either of such orders. It nevertheless remains true that the jurisdiction of these officers may be subverted by affirmative proof of the non-existence of those facts which were necessary to confer jurisdiction to entertain the proceedings in question. (*Chemung Canal Bank v. Judson*, *supra*; *Dobson v. Pearce*, *supra*.)

It is alleged by the defendants that the issue and return *nulla bona* of an execution upon the Arnold judgment, which is undoubtedly essential to the validity of an order in supplemental proceedings, as well as the right to institute and maintain an action to reach the equitable assets of a judgment debtor, have not been complied with in this case.

It is argued by appellant's counsel that the execution issued on that judgment was so defective in many respects that it was entirely void, and that the sheriff could make no valid return thereon. It remains nevertheless true that the sheriff did treat that execution as a valid execution imposing a duty upon him, and did make a return thereon that he could find no property of the defendant out of which to satisfy the same.

We are of the opinion that the execution in question, although extremely defective, and subject to be vacated and set aside on motion, for informality, was yet not so defective that it can be treated as void when questioned in a collateral proceeding. Most of the defects appearing in the execution have been held to be amendable, and defects of that character can only be taken advantage of by the defendant in the execution in a direct proceeding to set it aside. (*Abels v. Westervelt*, 15 Abb. Pr. 230; *Kimball v. Minger*, 2 Hill, 364; *Dominick v. Eacker*, 3 Barb. 18; *Berry v. Riley*, 2 id.. 308; *Kelly*

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v. *McCormick*, 28 N. Y. 318; *James v. Gurley*, 48 id. 163.) A variance between the amount of an execution and the judgment will not vitiate the execution. (*Borland v. Stewart*, 4 Wend. 568; *Jackson v. Page*, id. 587.) The want of a seal thereto, although required by law, does not render it void. (*People v. Dunning*, 1 Wend. 16; *Dominick v. Eacker*, *supra*.) If any sum whatever be due upon a judgment an execution issued thereon which claims too much is not void. (*Peck v. Tiffany*, 2 N. Y. 451.) An execution which gives unauthorized directions as to its return is not void, as the law prescribes the sheriff's duty in making returns, and he is not controlled by such directions. (*Hutchinson v. Brand*, 9 N. Y. 208; see, also, *Cutler v. Rathbone*, 1 Hill, 204.) The amount named in the execution may be amended so as to make it conform with the amount of the judgment. (*Oakley v. Becker*, 2 Cow. 454.) Errors in the description of the court where judgment was obtained, and the place where the judgment-roll was filed, have been held amendable. (*Abels v. Westervelt*, *supra*.) Where an execution issued upon a justice's judgment and filed in the county clerk's office, was not signed by the clerk, held sufficient to protect the officer executing it, although the statute required the signature of the clerk to such execution. (*Hill v. Haynes*, 54 N. Y. 153.) An omission in an execution of a teste, in the name of a judge of the court, or of a direction as to the time of its return, is amendable. (§ 57, chap. 280, Laws of 1847; *Douglas v. Haberstro*, 88 N. Y. 611.)

We think that all of the essential facts necessary for the direction and protection of the sheriff in executing this process were either stated in the execution or were plainly inferable from other facts therein stated. The execution was entitled on the outside "N. Y. Superior Court. J. E. Arnold vs. Elbert Nostrand." It was directed to the sheriff of the county of New York, and stated in the body thereof, among other things, that judgment was rendered on the 2d day of March, 1874, in an action in the Superior Court, in favor of the plaintiff and against the defendant, as appeared by the judgment-

roll filed in the office of the clerk of the Superior Court; that said judgment was docketed in the county of New York, and that there was, on the 4th day of March, 1874, the sum of \$604.95 actually due thereon. It directed the sheriff to collect the same from the property of the defendant in the judgment. We think it was fairly inferable by the officer receiving this process, from the title on the execution, the residence of the attorneys who issued it, and of the party against whom it was to be executed, and the notice of its docket in New York county, that the judgment therein described was rendered by the Superior Court of the city of New York, and that the judgment-roll therein was filed in the office of the clerk of that court, which by law was located in that city. The amount for which judgment was rendered was fairly inferable from the statement of the amount which was asserted to be due thereon, and the direction to collect that amount with interest from the day judgment was rendered. Whether this be so or not, we think that each of the defects pointed out in this execution was amendable, and did not render the process void.

It is quite clear that the official return of the officer upon this execution, as well as others, proved in the case, that the defendant therein had no property out of which he could satisfy the executions, furnishes sufficient evidence of the exhaustion of legal remedies against the debtor to authorize the institution of a suit to reach other property possessed by him.

The defendants do not attempt to assail the existence or validity of the several judgments under which the plaintiff was appointed receiver; and when we have arrived at the conclusion that the execution upon the Arnold judgment was a valid process, the jurisdictional facts upon which the authority of the officer depends to make the appointment of a receiver of the property of the judgment debtor seem to be affirmatively established.

The reasons given for holding the first execution valid apply with still greater force to the executions issued upon the Loaners' Bank and Poppenhusen judgments for the reason

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that the defects in those executions were of an unimportant character and plainly amendable.

It was held by the court below that the order appointing the plaintiff receiver under the Loaners' Bank judgment was invalid for the reason that the bank had ceased to be a corporation by virtue of the appointment of a receiver of its effects under proceedings in bankruptcy, subsequent to the recovery of its judgment against Nostrand. In this we think the court erred. It was competent for the receiver of the bank to institute proceedings in the name of the insolvent corporation to collect any debts or judgments owing to it; and to procure or sanction the appointment of a receiver of the assets of such debtor and we must assume that he procured such appointment. (Chap. 295, Laws of 1832; *McCulloch v. Norwood*, 58 N. Y. 566.)

Force was denied by the court below to the appointment of the receiver under the Poppenhusen judgment on account of the lapse of time intervening between the institution of supplementary proceedings; and the final appointment of a receiver therein (from April, 1875, to February, 1878), upon the ground that a presumption arises that such proceedings had failed, for the reason that it was not shown that they had been regularly adjourned from time to time. It was said that jurisdiction was lost by the judge entertaining them through an omission to cause them to be regularly adjourned.

As we have seen, the order of the judge making the appointment furnishes conclusive evidence, in all collateral inquiries, of the regularity of the proceedings in which such order was made. We also think the court erred in holding that a failure to adjourn such proceedings regularly caused a loss of his jurisdiction by the judge entertaining them. The contrary has been held in some cases, and that would seem to be the necessary deduction from the character of the jurisdiction which the court and officers have in these proceedings as we have hereinbefore seen. (*Underwood v. Sutcliffe*, *supra*; *Edmonston v. McLoud*, 16 N. Y. 543; *Wegman v. Childs*, *supra*; *Pitt v. Davison*, *supra*.)

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The appointment of assignees in bankruptcy for the individual members of a firm does not authorize such assignees to take the firm property. By virtue of such an appointment they become entitled only to the divisible share of the member whom they represent in the assets of such firm after the partnership debts are all paid, and the equities between the individual members are settled. The proof, therefore, of the insolvency of three out of the four members composing the firm of Poppenhusen & Co. produced no legal effect upon the ownership of the Poppenhusen judgment.

It follows as the necessary result of our views that the order of the General Term should be reversed, and the judgment rendered at the Special Term affirmed.

All concur.

Order reversed and judgment affirmed.

RUDOLPH BERGMANN, Respondent, v. GEORGE JONES, Appellant.

On trial of an action for libel, where the alleged libelous publication contained charges injurious to plaintiff's character and to his business, and the complaint averred that by reason of the libel plaintiff had had been greatly injured in his business, by the loss of good-will and patronage, plaintiff was permitted to testify as a witness that immediately after the publication his business fell off, and to state the amount of his daily sales up to and immediately after such publication. *Held*, no error.

These questions were objected to generally. *Held*, defendant could not object on appeal that the complaint was not specific enough to authorize proof of special damage.

Shipman v. Burrows, (1 Hall, 442), *Hallock v. Miller*, (2 Barb. 630), *Tobias v. Harland*, (4 Wend. 537), *Linden v. Graham*, (1 Duer, 670), distinguished. Where evidence is received under a general objection, the ruling will not be held erroneous unless there are grounds of objection, which could not have been obviated had they been specified, or unless the evidence in its essential nature is incompetent.

Also *held*, that the evidence was sufficient to justify the submission of the question of special damage to the jury.

Also *held*, the fact that other persons had published the same libel, and

94	51
109	308
94	51
114	408
94	51
121	467
94	51
127	664
94	51
132	184
94	51
134	474
134	563
94	51
135	455

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that similar reports had been in circulation, in regard to plaintiff, did not affect his right to have the question so submitted.

Also *held*, that it was not error to allow plaintiff to testify to the efforts made by him to regain his business and to the hindrance he met with on account of the libel.

Where a publication is libelous *per se*, and is proved to be false, this is evidence sufficient to require the submission of the question of malice to the jury, and to warrant the allowance of exemplary damage; and this, although defendant give evidence tending to prove no actual malice. Such evidence is to be considered by the jury, and it is for them to determine, in view of all the evidence, whether punitive damages should be allowed or not.

It is not a ground for a motion to dismiss the complaint in an action for libel that the innuendoes therein are ambiguous or uncertain; any question as to their meaning may be submitted, upon proper requests, to the consideration of the jury.

Where the libelous article will bear the construction put upon it in the innuendo no other proof is necessary to show that defendant intended to make the charge against plaintiff imputed to him.

A publication, containing statements holding a person up to scorn or ridicule, and which degrade or disgrace him in the eyes of men, is libelous *per se*.

(Argued October 10, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made at the December term, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This was an action for libel. The material averments of the complaint are as follows:

“*Third*. — That on the said 12th day of March, the defendant, being the editor and publisher of said New York *Times*, a newspaper having a large circulation in the States of New York and New Jersey, and throughout the United States, as this plaintiff is informed and believes, maliciously composed and published of and concerning this plaintiff, in said newspaper, the false and defamatory article and matter following, to-wit:

‘The gossips of Guttenberg, N. J., are excited over a mystery which has developed in their midst. The scene of the mystery is a little two-story frame building on Fifth street near Herman

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avenue. Rudolph Bergmann owns the structure. In the front part he keeps a small grocery store. The rear rooms he occupies as sleeping and eating-rooms. His habits are miserly, and his wife, who left him some time ago, is said to have left because of the meagerness of his supplies, and he now lives by himself, with none to share his joys and sorrows. The upper part of the building is occupied by a German tenant, who confesses that he has always looked on Mr. Bergmann with suspicion. Beneath the building is a noisome cellar. It is always covered with about two feet of water, and having been the depository of all the rubbish of the store and dwelling-house, has for some time emitted the most noxious vapors. Two or three months ago the cow of one of his neighbors died, and the carcass lay for seven days unburied. It was fast becoming a mass of corruption, when Bergmann, impelled by some motive not understood, cut it into pieces and cast the fragments into the cellar. The tenant says that at the same time the putrid carcass was thrown into the cellar, he heard a noise as of a man splashing around in the water in the cellar. It was the dead of night when these noises aroused him, and on making further observations, he saw Bergmann cut away the cellar stairs so as to prevent descent into it and bolt down the hatchway. Convinced that the body of a man had been cast into the cellar, and that the carcass of the cow had been thrown in so as to confuse any who might search the place, the tenant told his story to Justice Schmidt. The justice and constable Walker visited the house. The cellar stairs were indeed gone, and the constable found it necessary to make his way into the flooded cellar with a ladder. The stench was overpowering, but he walked around in the water almost up to his knees till he had learned enough to convince him that there was reasonable ground for the tenant's suspicion. He says that while feeling around in the water, his hand came in contact with what he believes to have been a human arm, and afterward with teeth, which he judges were those of a human being. Why he did not bring them out in the light of day does not appear. The matter was brought to the notice of the town committee and an investigation will

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be made. Bergmann's neighbors now recall the fact that a year ago a man who boarded with Bergmann strangely disappeared, and a few days later his grocery was replenished with a new stock, thereby meaning and intending to accuse the plaintiff of the crime of murder, or of being accessory thereto, and meaning, and intending to have it understood and believed that the plaintiff had been guilty of the crime of murder, and had murdered and concealed a man in his, the plaintiff's cellar, or that the plaintiff was accessory to such crime and guilty as such, and meaning and intending to accuse the plaintiff of, and to have it understood and believed that he was guilty of a great and infamous crime, and meaning, and intending to accuse the plaintiff of odious and disgraceful conduct, and thereby injure and destroy his character and bring him into disrepute and disgrace.

Fourth. — That said article and matter so as aforesaid published, so far as it accused, charged or insinuated that this plaintiff had been, or was guilty of the crime of murder, or of any other crime, is utterly false and defamatory, and all such statements and insinuations therein contained to that effect, and all the statements and insinuations reflecting upon the character or conduct of this plaintiff to the effect that he had been guilty of odious, disreputable or disgraceful acts or conduct, are in like manner false and defamatory.

Fifth — That plaintiff has always been a good and worthy citizen and was never guilty of any of the criminal, infamous or disgraceful acts which are charged, stated or insinuated in the said libelous article, and had enjoyed the respect, confidence and esteem of the community where he lived and wherever he was known. That by reason of the composition and publication of the matter aforesaid in such newspaper, the plaintiff has been brought into disrepute and disgrace and has suffered in his good name and reputation, so much so, that he is accosted and insulted in the streets by allusions to this defamatory matter, and has suffered and still suffers thereby.

Sixth. — That by means of said publication, the plaintiff

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has been greatly injured in his reputation to his damage \$20,000.

Seventh. — That by means of said publication, the plaintiff has also been greatly injured in and about his business as a merchant by the loss of good-will and patronage, and suffered pecuniary loss thereby, to-wit: to the amount of \$5,000."

The facts, so far as pertinent to the questions discussed, are stated in the opinion.

B. F. Einstein for appellant. In an action for libel, a party claiming for loss of patronage must set out in his complaint the names of the persons whose patronage he lost. (*Shipman v. Burrows*, Hall, 399, 411, 412, 419, 420; *Hallock v. Miller*, 2 Barb. 630; 2 Phil. Ev. 248; *Hartley v. Herring*, 8 Term R. 133; *Tilk v. Parsons*, 2 C. & P. 201; *Tobias v. Harland*, 4 Wend. 537; *Linden v. Graham*, 1 Duer, 670; *Havemeyer v. Fuller*, 60 How. Pr. 316, 322; *Kendall v. Stone*, 5 N. Y. 14; *Knickerbocker L. Ins. Co. v. Ecclesine*, 34 Supr. Ct. 76; *Jutte v. Hughes*, 67 N. Y. 267; *Stafenhurst v. Am. Manuf. Co.*, 46 How. Pr. 510; *Herrick v. Latham*, 10 Term R. 281.) To entitle a party to recover special damages they must appear to be the legal and natural consequence of the wrongful act charged. (*Crain v. Petrie*, 6 Hill, 522; *Hastings v. Palmer*, 20 Wend. 225, 226; *Olmstead v. Brown*, 12 Barb. 657, 662; *Beach v. Ranney*, 2 Hill, 314; *Terwilliger v. Wands*, 17 N. Y. 54, 57; *Schille v. Brokhans*, 80 id. 614; *Masterton v. Village of Mt. Vernon*, 58 id. 391; *Church v. Howard*, 79 id. 415, 423.) If the meaning of the words in an alleged libel is ambiguous, or the sense in which they were used is uncertain, and they are capable of both an innocent and an injurious interpretation, it is for the jury to determine, upon all the circumstances, in what sense they were used. (*Sanderson v. Caldwell*, 45 N. Y. 398, 402, 403; *Lewis v. Chapman*, 16 id. 369; *Snyder v. Andrews*, 6 Barb. 43; *Edsall v. Brooks*, 3 Robt. 294; *Dalloway v. Terrell*, 26 Wend. 388; Townshend on Slander and Libel, § 338; *Maguire v. Knox*, 5 Irish Com. L. 408.) The court erred in charging the jury that it was in the

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discretion of the jury to give the plaintiff exemplary damages. (*Sanders v. Evening Mail Ass'n*, 9 Hun, 288, 294, 295; *Taylor v. Church*, 8 N. Y. 452, 460; 1 E. D. Smith, 292; *Bennett v. Smith*, 23 Hun, 50, 53; *Hamilton v. Eno*, 81 N. Y. 116, 127; *Fry v. Bennett*, 4 Duer, 257; *Hun v. Bennett*, 4 E. D. Smith, 659.)

Benjamin Estes for respondent. The article complained of is libelous *per se*. (Townshend on Slander and Libel [3d ed.], 262, § 176; Starkie on Slander [Wend.] 169; 2 Addison on Torts [Wood's ed.], 307, 311; *Cooper v. Greeley*, 1 Denio, 359; *Cramer v. Riggs*, 17 Wend. 209; *Moore v. Bennett*, 48 N. Y. 472, 477; *Edsall v. Brooks*, 26 How. Pr. 431.) The article, being libelous *per se*, is therefore actionable *per se*, and no proof of actual malice or of damage is required. Both malice and damage are implied. (2 Add. on Torts [Wood's ed.], 311, § 1090; *Rout v. King*, 4 Wend. 114, 136; 7 Cow. 613; *Gillman v. Lowell*, 8 Wend. 578; *Sanderson v. Caldwell*, 45 N. Y. 398; *Terwilliger v. Wands*, 17 id. 49, 54; *King v. Cale*, 7 Cow. 613, 620; *Darry v. People*, 10 N. Y. 138; *Viele v. Gray*, 10 Abb. Pr. 7; *Fry v. Bennett*, 4 Duer, 247; *Howard v. Sexton*, 4 N. Y. 157.) The jury in this case had the right to give exemplary or vindictive damages in addition to the actual damages sustained by plaintiff. (*Samuels v. Evening Mail Ass'n*, 75 N. Y. 604; *King v. Root*, 4 Wend. 139; *Taylor v. Church*, 8 N. Y. 461; *Tillotson v. Chatham*, 3 Johns. 56.) Plaintiff having alleged injury to his business, in his complaint, evidence tending to prove such allegation was properly admitted. (*Terwilliger v. Wands*, 17 N. Y. 60.) The evidence offered relating to what occurred before some pretended public body in New Jersey was properly rejected. (2 Addison on Torts [Wood's ed.], 336, § 1107; Townshend on Slander and Libel, 398, § 228; *Hasmer v. Lovland*, 19 Barb. 116; *Perkins v. Mitchell*, 31 id. 461; *Cobman v. Southwick*, 9 Johns. 49; *Woodward v. Paine*, 15 id. 493; *Wilson v. Boerum*, id. 286; *Powell v. Walters*, 17 id. 176; *Van Ness v. Hamilton*, 19 id. 368; *Fry v. Bennett*, 5 Sandf. 68-75; *Andrews v. Van-*

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duzer, 11 Johns. 349; *Daly v. Byrne*, 1 Abb. N. C. 160; *Hayes v. Tibbetts*, 2 Abb. [N. S.] 97, 102; *Bush v. Prusser*, 16 N. Y. 361; *Hutchkiss v. Oliphant*, 2 Hill, 510; *Dale v. Lyon*, 10 Johns. 447.) An injury to a person's good name, good-will of business, or reputation is an injury to property. (*Samuels v. Evening Mail Ass'n*, 75 N. Y. 604; *Shoe and Leather B'k v. Thompson*, 18 Abb. Pr. 413; *Knickerbocker L. Ins. Co. v. Ecclesine*, 34 Sup. Ct. 97, 106; *Seeley v. Engell*, 13 N. Y. 548; 6 Bosw. 181; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 395, 396.)

MILLER, J. Upon the trial of this action objections were made, by the defendant's counsel, to certain questions which were put inquiring as to the losses sustained by the plaintiff in his business by reason of the publication made by the defendant and set forth in the complaint. The plaintiff was asked, whether, immediately after the publication of the article alleged to be libelous, his business fell off, which question was objected to, the objection overruled, and exception taken by the defendant. The plaintiff answered that it did. He then testified as to the amount of his sales *per diem* up to the time of the publication of the article in question, and he was then asked the amount of his sales immediately after said publication. The question was objected to, the objection overruled and an exception taken by defendant. The plaintiff then answered, stating what his sales were on week days and what on Sundays. The question was then asked him as to the amount of sales on Sundays immediately before the publication, which question was also objected to, the objection overruled, and exception taken, and the witness answered. The article was libelous on its face, and assailed the character of the plaintiff individually and as the proprietor of a grocery store. In the complaint the plaintiff claimed damages to his reputation, by reason of the alleged libel, to the amount of \$20,000. He also alleged that by reason of the publication he had been greatly injured in his business as a merchant by the loss of good-will and patronage, and had suffered pecuniary loss thereby, to-wit: to the amount of \$5,000.

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The testimony objected to was offered evidently for the purpose of showing losses sustained under the last allegation, and it tended to show such losses. There can be no serious question but that a party injured has a right to recover special damages where a claim for the same is properly made in the complaint. The objections of the defendant's counsel to the questions put were general in their character, and stated no specific ground upon which the testimony should be excluded. The counsel for the appellant claims that the proof of special damages was not admissible under the pleadings because it was not properly pleaded. Had this point been taken on the trial, and the objection held to be valid, the judge had the power to allow an amendment of the pleadings upon such terms as would be proper and just, and had he done so the objection might have been obviated. The rule is well established that where there is a general objection to evidence and it is overruled and the evidence is received the ruling will not be held erroneous, unless there be some grounds which could not have been obviated had they been specified, or unless the evidence in its essential nature be incompetent. (*People v. Beach*, 87 N. Y. 508.) The defendant having failed to specify any such ground upon the trial he is not in a position to urge the same upon this appeal.

Numerous decisions are cited by the defendant's counsel to sustain the position that the evidence objected to was inadmissible. From an examination of the cases referred to it appears that none of them are analogous to the one at bar. In *Shipman v. Burrows* (1 Hall, 442) the alleged slanderous words were not actionable *per se*, and were spoken of the defendant as a shipmaster, the plaintiff alleging that by reason of the same the insurance companies of the city of New York refused to insure any vessel commanded by the plaintiff or any goods laden on board the vessel by him commanded. It was held that evidence that the New York insurance companies refused to make such insurance was improperly received. The decision of the court was based upon the ground that the averments in the declaration were not sufficiently definite to allow

such evidence to be given on the part of the plaintiff. This rule might well apply in the case cited, where it appeared that there was no difficulty in showing the company or companies which had refused to insure the vessel. It may also be remarked that as no point was made to the contrary it must be assumed that the specific objection was taken upon the trial that the complaint was insufficient, and hence the point now made did not arise. Nor should it be overlooked that at the time of the decision in the case cited the right to grant an amendment to the pleadings upon the trial did not exist and was not recognized as is the case under the present system of pleadings and practice, and hence the plaintiff lost no rights if the objection urged was not distinctly taken upon the trial. In *Hallock v. Miller* (2 Barb. 630) special damages were claimed, giving the names of persons specifically, and proof was offered as to other persons not named in the declaration, which was excluded. It is evident that the distinct point was taken that the complaint was insufficient to admit the evidence and hence the case is not in point. In *Tobias v. Harland* (4 Wend. 537) the case arose upon a demurrer, and the question was distinctly raised whether special damages were sufficiently alleged in the declaration. In *Linden v. Graham* (1 Duer, 670) the action was brought for slander of title, and the complaint alleged that the speaking of the slanderous words prevented the plaintiff from procuring a loan upon a mortgage upon real estate, but did not state the name of any person who would have made a loan. On demurrer the court held that the complaint did not sufficiently allege the special damages. It will be seen that the distinct point was presented as to the sufficiency of the allegations contained in the complaint. In none of the other cases cited is it held that an objection to proof of special damages by the loss of customers, on the ground that they are not named in the complaint, is available where this ground is not specifically stated, and hence the distinct point now raised was not presented. Cases may arise where, from the nature of the business in which the party is engaged, it would be almost impossible to prove by witnesses,

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who had dealt with the party bringing the suit, the loss of trade. The plaintiff's business in this case was evidently a very small one, in which it would be very difficult to prove damages of any specific amount, arising out of the loss of the trade of a single customer and under such circumstances, after proof of the circulation of the libel and evidence tending to show the injury to plaintiff's business, testimony establishing a falling off of his business might be competent, not as distinct proof of loss, but as bearing upon the question of whether the plaintiff had sustained any damage. It is true such evidence would not be very strong, but from the necessity of the case we think, it might be competent to submit to the jury for what it was worth in a case of the character of the one at bar, without, alleging in the complaint specifically the names of the persons whose custom had been lost by means of the alleged libelous publication.

It is also insisted that the judge erred in charging the jury that they could give the plaintiff damages for loss of business, and in refusing to charge at defendant's request that "the jury cannot award damages to the plaintiff for loss of business, no special damage having been proven." We think there was no error in the portions of the charge referred to, or in the refusals to charge as requested. The complaint alleged an injury to the plaintiff's business by reason of the publication of the alleged libel, and there was proof establishing the fact that the business had diminished since that time. The testimony in this respect tended to show a loss to plaintiff by reason of the alleged libelous publication, although there was no direct proof as to the amount of profits the plaintiff had realized on his sales, or the amount of the losses he had sustained. It cannot be said, we think, that there was no evidence, whatever, to show damages to the plaintiff's business, and, under the circumstances, it was a fair question for the jury to consider the proof as to losses in business, in determining what amount, if any, should be awarded in favor of the plaintiff for his damages. The charge as made covered this question, and fairly submitted it to the consideration of the jury. None of

the authorities cited by the appellant's counsel in this connection are in conflict with the views we have expressed, and there is no ground for claiming that the plaintiff failed to give some evidence which established losses to his business which followed as a necessary consequence to the publication of the alleged libel. The sensible diminution of his sales after the publication was some proof to establish his claim for special damages, and unless the jury was satisfied from the evidence that it might be attributable to other and different causes it could not be overlooked by them in determining the amount. There was certainly evidence which tended to show that the injury to plaintiff's business was attributable to the alleged libelous publication, that it was the cause of the loss of business to him.

The evidence which showed that other papers had published the alleged libel, and that similar reports had been circulated in regard to the plaintiff was to be considered by the jury, and it is fair to assume that the defendant was not made liable in damages for other publications, or for the acts and conduct of other parties. The failure of the plaintiff to show the actual amount of the profits was a defect in his proof which might properly be urged before the jury, and it is not to be assumed that a verdict was rendered in this respect for a larger amount of damages than the evidence justified.

It is also insisted that the court committed an error in charging the jury that it was in their discretion to give the plaintiff exemplary damages. The particular part of the charge in this respect to which exception is taken is to the decision of the court in favor of several requests made by the counsel for the plaintiff. The first request lays down the rule that in an action of libel the plaintiff gives evidence of malice, whenever he proves the falseness of the libel, that it is then a question for the jury to say whether it is of such a character as to call for punitive or exemplary damages, and that the question is not taken from them, because the defendant gives evidence which tends to show that there was in fact no actual malice. It must be borne in mind that the article in question was libelous *per se*.

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The judge had so charged just prior to the request, and the portion of charge under consideration must be taken as applicable to the case before the court and jury. The second request asked the court to charge that the falseness of the libel being proof of malice sufficient to uphold exemplary damages, the right to recover them rests in the act done, in the publication of the false libel, and that the publisher is chargeable with the legal consequences, which it is the right of the jury to redress by imposing reasonable damages beyond any actual injury shown, and the court responded that he had charged this in substance in the direct language of the law. The third request was as follows: "That in an action for libel the falseness of the libel is an evidence of malice, and it is a question for the jury whether the malice is of such a character as to call for exemplary or punitive damages; that is, such an amount of damages as may be reasonable beyond any damages or injury actually shown." The falsity of the libel is sufficient proof of malice to uphold exemplary damages, and plaintiff's right to recover them is in the discretion of the jury. When the falseness of the libel is proved, as a general rule, it is sufficient to warrant the jury in giving exemplary damages. This principle is upheld in *Samuels v. Evening Mail Association* (75 N. Y. 604), where the decision of the General Term, reported in 9 Hun, 288, is reversed upon the dissenting opinion of DAVIS, P. J. The above requests to charge are in the language of a portion of that opinion, and neither of them go beyond that. The plaintiff having proved the libel, which the defendant in his answer admitted he published, and its circulation, and it appearing that it was false and untrue, the plaintiff's cause of action was established, and it only remained for the jury to determine, in view of all the facts presented upon the trial, what damages should be awarded. Upon the charge made against the plaintiff in the article published, the falsity of which was made to appear, it was for the jury to say in their discretion whether punitive or exemplary damages should be awarded. The proof on the part of the defendant that there was no actual malice was to be considered in the deter-

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mination of the question whether exemplary damages should be given. We have examined the authorities cited by the defendant to sustain his position, and we think that none of them are in conflict with the rule laid down in that portion of the charge which has been discussed. Some other questions are made as to the rulings of the court in reference to the admission of evidence. The question put to the plaintiff as follows: "State what efforts you made to regain your business, and what opposition or hindrance you met with on account of this libelous article," was properly admitted. The plaintiff having proved that the amount of his receipts had largely diminished since the publication of the alleged libel, he had the right to show that he had endeavored to counteract its effect, and in doing this he met with opposition which was attributable to the publication of the libelous article in question.

We think that the motion to dismiss the complaint was properly denied. It was made upon the grounds that the article did not bear the construction placed upon it by the innuendo in the complaint, that is, that the defendant intended to charge the plaintiff with murder, etc., and second that there is no proof that the defendant intended to so charge the plaintiff. The article reflected severely upon the character and conduct of the plaintiff, and the complaint, after setting forth the libel, contained the allegation that he thereby meant to accuse the plaintiff of the crime of murder, or being accessory thereto, and meant and intended to have it understood that the plaintiff had been guilty of the crime of murder, and had murdered and concealed a man in his cellar, or that he was the accessory of such crime. These allegations sufficiently state that the alleged libelous matter charged the plaintiff with murder, and it is difficult to see upon what ground it can be claimed that, upon a motion to dismiss the complaint, they were not sufficient. It is no answer to say that they were ambiguous and uncertain, for even if such was the case any question as to their meaning might be submitted, upon proper requests, to the consideration of the jury. This not being done we think that the defendant is not in a position to claim that there was

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error in denying the motion to dismiss the complaint upon the first ground stated. Neither can it be said, as the case stands, that there was no proof that the defendant did intend to charge the plaintiff as alleged in the complaint.

In the cases cited by the appellant's counsel to sustain the point last urged, the distinct question was raised and left to the jury as to the meaning of the alleged libelous publication. (See *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105, and *Maguire v. Knox*, 5 Irish R. Com. L. 408.) In the case at bar the judge left it to the jury to determine whether the charge of murder was imputable to the defendant, and in this respect the charge was favorable to him. The subsequent portion of the charge, that any thing which held the plaintiff up to scorn or ridicule, any thing that degrades or disgraces him in the eyes of men is libelous, and that the article was libelous *per se*, was not inconsistent with the portion last referred to, and it cannot be said on that ground that the judge took away from the jury the right to consider the article and to determine whether that charged the plaintiff with murder. It might well be that the jury found that murder was not charged and still that the article in question was libelous *per se* in other respects.

We have examined all the other questions raised and in none of them do we find any ground for reversing the judgment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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HENRY HENTZ et al., Respondents, v. HENRY A. MILLER, Appellant.

The real owner of personal property is only estopped from asserting his title to it when and so far as he has allowed another to have the appearance of ownership.

H. M. Cutter & Co., cotton brokers, falsely and fraudulently represented to plaintiffs that they had orders from the F. M. Co. to purchase for it one

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hundred bales of cotton, and relying thereon, plaintiffs contracted to sell that quantity to the corporation named. Bought and sold notes in the usual form were delivered by plaintiff's brokers, in which the sale was stated to have been made to said corporation. The notes contained the following: "Payment guaranteed by H. M. Cutter & Co. Bill to H. M. Cutter & Co." No bill, warehouse receipt or other muniment of title was in fact delivered to Cutter & Co. The cotton was delivered to that firm to be delivered to the supposed purchaser; they placed it in a warehouse, obtained advances upon the warehouse receipts, and it was subsequently sold to *bona fide* purchasers. In an action to recover possession of a portion of the cotton, *held*, that the transaction, by means of which Cutter & Co. obtained possession, was a larceny; that the words "Bill to H. M. Cutter & Co." amounted merely to a *memorandum*, and taken with the rest of the contract imported that when the bill was made out to the purchaser named, it was to be sent to Cutter & Co.; and that as plaintiffs had delivered to that firm no symbol of property, or indicium of title giving an appearance of ownership, they were not estopped from asserting their title and were entitled to recover.

(Argued October 13, 1888; decided November 20, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 19, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This was an action of replevin to recover certain bales of cotton.

The facts were stipulated and are substantially as follows:

Plaintiffs, being the owners of some two hundred bales of cotton, sent samples thereof to Weld & Co., their brokers, to obtain purchasers. On January 4 and 5, 1878, Henry M. Cutter, of the firm of H. M. Cutter & Co., cotton brokers in said city, falsely represented to Weld & Co. that his firm had orders from the Freeman Manufacturing Company, of North Adams, Mass., and the Renfrew Manufacturing Company, of South Adams, Mass., to buy cotton for them, one hundred bales each, and proposed to buy plaintiffs' cotton to fill said orders. This offer was communicated to plaintiffs, who accepted it.

Bought and sold notes containing the names of plaintiffs as sellers, and of said manufacturing companies respectively as

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buyers were made out and delivered by Weld & Co., in the usual manner, the terms being "cash in ten days." In these notes appeared the words "payment guaranteed by H. M. Cutter & Co.," "bill to H. M. Cutter & Co." In pursuance of said supposed sales plaintiffs delivered the cotton, including the bales in suit, to Weld & Co., by whom it was delivered to H. M. Cutter & Co., "for the purpose of being by them shipped to the supposed purchasers, respectively." No muni-ment or indicium of title of any kind was delivered to Cutter & Co., or any document whatever except said bought notes, and the said delivery of the cotton by sellers' brokers to buyers' brokers was made in "the usual course of business in such cases." Cutter & Co., instead of shipping the cotton, stored it in a warehouse in the city of New York, and took negotiable warehouse receipts for it, at first in their said firm name, but afterward, at Cutter's request, and "in order to facilitate Cutter & Co. in raising money on said cotton," the warehouseman, issued new warehouse receipts in the name of G. H. Price & Co., who thereupon, at Cutter's request, by hypothecating the said receipts, raised money on them and paid it over to Cutter & Co., and then sold the cotton to Ralli Brothers, who, upon delivery to them of the warehouse receipts indorsed by Price & Co., and by the intermediate holders who had advanced the money thereon, and after they had received the cotton itself, paid for it at market rates, and had the same removed and stored in defendant's warehouse. On January 10, 1878, Cutter & Co. absconded, and it was then first discovered by plaintiffs and defendant that said firm had no orders from either of said manufacturing companies to buy any cotton, and that Cutter's statements in that behalf were utterly false. Neither of said manufacturing companies ever assumed, adopted or ratified said pretended purchases, or received any of said cotton, or any of the proceeds thereof. Plaintiffs had no knowledge of the fraudulent acts of Cutter or his firm, until after they had absconded. Thereupon, the bales in suit being found in defendant's warehouse, possession was demanded and was refused.

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Frederic R. Coudert for appellants. Cutter was not guilty of larceny. (*Zinc v. People*, 77 N. Y. 126; *People v. Call*, 1 Denio, 123; 2 Bishop's Crim. Law, 817; *Regina v. Barnes*, 2 Den. C. C. 59; 1 Eng. L. & Eq. 579; *Ross v. People*, 5 Hill, 294; *Mowrey v. Walsh*, 8 Cow. 238; *People v. McDonald*, 43 N. Y. 61; *Smith v. People*, 53 id. 111) Any one who obtains goods under false pretenses can by estoppel create a valid title to a *bona fide* purchaser as against the person defrauded. (*Paddon v. Taylor*, 44 N. Y. 375; *Saltus v. Everett*, 20 Wend. 268-270; *Mowrey v. Walsh*, 8 Cow. 238-245; *Parker v. Patrick*, 5 Term R. 175; *Armour v. Mich. C. R. Co.*, 65 N. Y. 116; *Bassett v. Spofford*, 45 id. 392; *Weyman v. People*, 4 Hun, 515; *Zink v. People*, 6 Abb. N. C. 429; *Loomis v. People*, 67 N. Y. 322-325; *Smith v. People*, 53 id. 111; *Barnard v. Campbell*, 55 id. 465; *Covill v. Hill*, 4 Denio, 323; *McNeil v. Tenth Nat. B'k*, 55 N. Y. 325; *Ballard v. Burgett*, 40 id. 314; *Marine B'k v. Fiske*, 71 id. 358; *Craig v. Marsh*, 2 Daly, 61; *Babcock v. Lawson*, 20 Alb. L. J. 407; *People v. Johnson*, 12 Johns. 291; *Regina v. Barnes*, 2 Den. C. C. 59; *Ross v. People*, 5 Hill, 294; *People v. McDonald*, 43 N. Y. 61; *Parker v. Patrick*, 5 Term R. 175; *Peer v. Humphrey*, 1 H. & W. 28; *Root v. French*, 13 Wend. 570; *Watson v. People*, 33 Hun, 81.) One obtaining goods by fraudulent representations of agency is guilty, not of larceny, but of obtaining goods under false pretenses. (*Craig v. Marsh*, 2 Daly, 61; *People v. Johnson*, 12 Johns. 291; *Rex v. Atkinson*, 2 East's P. C. 669; 8 Cow. 243; 2 Bishop on Crim. Law, § 441; *Commonwealth v. Hulbert*, 12 Motc. 416; *Reg. v. Davis*, 11 Cox's C. C. 181; *McCorkle v. State*, 1 Coldw. 333; *Reg. v. Robinson*, 9 L. Canada, 278; *Higgins v. Moore*, 34 N. Y. 422; French Penal Code, art. 405; Italian Penal Code, art. 626; Cass 18 Nov. 1837; S. V. 88, 1366.)

M. A. Prentiss for respondents. Cutter's offense was grand larceny. (4 R. S., chap. 1, tit. 3, art. 5, § 78; *Collins v. Ralli et al.*, 20 Hun, 246, 251; *Loomis v. People*, 67 N. Y. 322; *Zink v. People*, 6 Abb. N. C. 424, 413-14; *Ward v. People*, 3 Hill,

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398; *Smith v. People*, 53 N. Y. 113; *Bassett v. Spofford*, 45 id. 391; *Weyman v. People*, 6 N. Y. Supr. Ct. 398; 62 N. Y. 623; *Justices, etc. v. People, ex rel. Henderson*, 90 id. 14; *Barnard v. Campbell*, 58 id. 76; 24 Hun, 658.) The cotton belongs to the plaintiffs. They have never parted with their property in or title to it. (*Saltus v. Everett*, 20 Wend. 275; *Covill v. Hill*, 4 Denio, 327; *Ballard v. Burgett*, 40 N. Y. 322-4; *Barnard v. Campbell*, 55 id. 463; *F. & M. N. B'k v. Logan*, 74 id. 569; *Cary v. Hotelling*, 1 Hill, 313; *Spraight v. Hawley*, 39 N. Y. 441; *McGoldrich v. Willets*, 52 id. 617; Benjamin on Sales [2d Am. ed.], § 433; *Cauldwell v. Bartlett*, 3 Duer, 340; *Keyser v. Harbeck*, id. 373, 383; *Craig v. Marsh*, 2 Daly, 61; 20 Hun, 255; *Comer v. Cunningham*, 77 N. Y. 399; *McNeil v. Tenth Nat. B'k*, 46 id. 330; *Barker v. Dinsmore*, 72 Penn. St. 427; *In re The Idaho*, 3 Otto, 583; *Cundy v. Lindsay*, L. T. [N. S.] 573; *Higgins v. Burton*, 5 Weekly Rep. 683; *Hardman v. Booth*, 7 L. T. [N. S.] 638; *Fowler v. Hollins*, L. R., 7 Q. B. 616.) An estoppel can arise only where the "owner has, by his own direct voluntary act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal, as an agent." (*Saltus v. Everett*, 20 Wend. 278; *Marine B'k v. Fiske*, 71 N. Y. 358; *F. & M. N. B'k v. Logan*, 74 id. 580-586.) The fact that Cutter & Co. had warehouse receipts (though wrongly issued to Price & Co. by Richards) which were transferred to Ralli Brothers, was not conclusive evidence of title in Ralli Brothers. (*First Nat. B'k of Toledo v. Shaw*, 61 N. Y. 297; *Barnard v. Campbell*, 55 id. 462; *Kinsey v. Leggett*, 71 id. 395; *Hazard v. Fiske*, 18 Hun, 282.) The "Factors Act" does not apply to this case. (2 R. S., chap. 4, title 5; *Kinsey v. Leggett*, 71 N. Y. 395; *Hazard v. Fiske*, 18 Hun, 282; *First Nat. B'k of Toledo v. Shaw*, 61 N. Y. 299.) The so-called guaranty by Cutter & Co. does not affect the rights of the parties to this transaction or distinguish the case at bar from that of *Collins v. Ralli et al.* (20 Hun, 246, 251). (2 R. S., chap. 7, title 2, § 2; 1 Pars. on Cont. 493; *Joslyn v.*

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Don, 19 Hun, 497; *McGregor v. Managers, etc.*, 16 E. L. & E. 180; *Rea v. Jamison*, 26 L. J. [N. S.] Mag. Cases, 146.)

DANFORTH, J. The defendant acquired all the right which Cutter & Co. had in the cotton, or which by any act of the real owner they appeared to have. His claim can go no further. One can only transfer that which he himself has, and the real owner is estopped from setting up his own right, only so far as he has allowed another to have the appearance of ownership. In *Collins v. Ralli* (20 Hun, 246) the referee and the General Term thought Cutter & Co. obtained possession of the cotton then in question by larceny, and upon that ground held that the defendants, who claimed under Cutter & Co., although themselves innocent purchasers, acquired no title to it against the true owner. Judgment was, therefore, rendered in his favor, and in this we concurred (85 N. Y. 637). We were satisfied with the very able opinion which led the Supreme Court to that result. The importance of the case and the argument of the learned counsel for the appellant have led to a re-examination of the question involved, but so far as it goes we see no reason to depart from that decision. Nor do we find that it conflicts at all with our judgment in *Zink v. People* (77 N. Y. 114; 33 Am. Rep. 589). There the prisoner had not only lawful possession of the property in question, but that possession was accompanied by evidence of title of the most formal kind, and if regarded only as an agent, he was at least intrusted with the goods for sale, with and not against the will of the owner. None of these facts appear in *Collins v. Ralli*.

It is said, however, in behalf of the appellant that the case now before us is not the same as the *Collins Case*. It is clearly not the same in words, and this is conceded in the opinion of the court below and by the learned counsel for the respondents.

A part of the bought and sold note in this case are the words: "Payment guaranteed by H. M. Cutter & Co. Bill to H. M. Cutter & Co." Nothing of the sort was in *Collins v. Ralli*, and if there is any difference in the two cases it is created by these words. The appellant claims nothing else. The ques-

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tion then turns upon them. The first clause must no doubt be taken to mean that Cutter & Co. have guaranteed payment by their principal, and as this is one of the terms of the contract, the plaintiffs may be held to have relied upon it. The further contention of the appellant would have great force if the second clause permitted the interpretation which the appellant's counsel claims for it. He says, "if Cutter was a mere custodian, why make the bill to him and thus furnish him with the title to, as well as the physical possession of, the cotton." If this assumed fact existed, the possession and document of title would correspond and there would be no difficulty in saying that the loss through Cutter & Co's fraud should fall upon him who allowed them to have the appearance of owners of the cotton. But I find no reason for supposing that the words "Bill to H. M. Cutter & Co." mean that the cotton had been billed to them. It is at most a memorandum, and, although found in the bought and sold notes and so evidence of the contract, is to be taken in connection with the other parts of the note, and there we find it plainly stated that the sale is "to the Freeman Manufacturing Co." It would, therefore, seem that the words amounted merely to a memorandum, and taken with the rest of the contract to mean only that the bill when made out to the purchasers, *i. e.* to the Freeman Manufacturing Co., was to be sent to H. M. Cutter & Co., through whom they were said to act. But no bill appears to have been sent or made out to any one, and there is nothing in the words themselves to require a different holding from that of the referee, *viz.*: that "no bill of sale or other muniment of title of any kind was delivered to" them (Cutter & Co.), nor any document whatever except the bought notes. These corresponded with the sold notes, and they described the contract of sale as one with the manufacturing company. The case cannot be treated as one where a party has by any means obtained "title to goods" as well as the possession with the assent of the owner.

It may be, as the appellant insists, that the owner was influenced in the sale to some extent by the financial responsibility of the assumed brokers, but the professed guaranty was only an-

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other element of fraud, and, however it might have weighed with the referee, cannot affect the question here.

But assuming the contract to have been an authorized contract — that Cutter & Co. were really acting for the manufacturing company, then we are to inquire as to the effect of their contract of guaranty. It was one of the terms of sale and the seller must abide by it. Cutter & Co. assumed to act for the apparent purchasers as brokers. As such they would have had a lien for advances made and expenses incurred, and probably, in case of insolvency of the real purchaser, a right to hold the cotton for indemnity against their liability to loss. But there would be no right of property or sale, save to enforce the lien, and its very existence would imply the right of property to be in some other person. That right was in the plaintiffs; it has never been diverted; nor was there in fact even a lien to be enforced. The case is a very hard one for the defendant and for those whom he represents, but the persons under whom they claim had no title, nor had the plaintiffs armed him with "any symbol of property." Both plaintiffs and defendant are innocent, and there is no reason, therefore, why the former should be a sufferer rather than the latter.

The judgment appealed from should be affirmed.

All concur, except RUGER, Ch. J., and RAPALLO, J. not voting.

Judgment affirmed.

JOHN J. MARVIN, Appellant, v. JAMES I. BROOKS, Impleaded
etc., Respondent.

Where an agent has been intrusted with his principal's money, to be expended for a specific purpose, the former may be required to account in equity; and upon such an accounting the burden is upon him, of showing that his trust duties have been performed, and the manner of their performance.

Defendant B. purchased certain securities under an agreement between him and plaintiff that the purchase should be made by B. on joint

94	71
109	481
109	488

94	71
137	254

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141	106

94	71
168	157

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168	*165

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account, each to furnish half of the purchase-money. Plaintiff placed in the hands of B. sufficient funds to pay for his half. At the time of the agreement the amount of the securities and the price were not known. In an action for an accounting, *held*, that B. became the agent of plaintiff as to the half interest of the latter, and a *quasi* trustee of the money placed in his hands, and of the property purchased; that the plaintiff had the right to call B. to account in equity, and the burden was upon the latter of showing both the price paid and what property was purchased.

(Argued October 19, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made December 23, 1881, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This was an action for an accounting.

The complaint alleged in substance that an agreement was made in September, 1878, between the plaintiff and defendant Brooks for a joint purchase of a lot of securities then held by one Potter, the executor of Ward; that the defendant Brooks had the sole management of the purchase; that the plaintiff, in the first instance, advanced nearly the whole of the purchase-money; that the plaintiff has no knowledge of the precise facts as to the property purchased, or as to the amount of the purchase-money; that the plaintiff has received a certain portion of the purchased property, but whether his full half he does not know; that he has been reimbursed part of his advances, but whether the full half he does not know. He, therefore, asked an accounting, with a judgment for such an amount of money and such proportion of the securities as may equalize his interests with those of the defendants, defendant Mifflin having an interest in Brooks' half, as such interests may be adjusted on the accounting.

The referee found the following facts: One Potter, as executor of the will of one Ward, deceased, was the owner of 3,578 shares of the capital stock of a corporation known as the Silver Islet Consolidated Mining and Lands Company; \$22,750 in bonds and scrip of the same company, at its par value; \$3,000 in bonds of the Silver Islet Mining Company of Lake Superior,

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at their par value ; said last-mentioned bonds being convertible into bonds and stock of the Silver Islet Consolidated Mining and Lands Company. On or about the 20th of September, 1878, a contract was entered into between the plaintiff on the one part and the defendants, Mifflin and Brooks, on the other part, by which it was agreed that the said Brooks should negotiate for and purchase, at the best terms that could be obtained, all the above-named stock and bonds, and that when so purchased one-half of said stock and one-half of said bonds should be delivered to and become the property of the plaintiff, on his paying therefor one-half of the purchase-money. On or about the 25th of September, 1878, Brooks, acting for himself and Mifflin, purchased of the said Potter all of said stock and bonds, and on or about the 5th day of October, 1878, delivered to the said plaintiff all of the half of said stock and bonds. The price paid for said stock and bonds by Brooks was the sum of \$44,280, one-half of which sum was paid by plaintiff to Mifflin and Brooks. The referee also found that said Brooks has fully accounted to plaintiff for all said stock and bonds, which were by the terms of said agreement to be delivered to plaintiff, and also for the purchase-price paid by said Brooks and the plaintiff as the consideration therefor.

It was claimed by plaintiff that there was included in the purchase three hundred and sixty-four shares of the stock of the Ontario Mineral Lands Company, and a note of \$28,000 of the Silver Islet Mining Company. Plaintiff asked the referee to find in substance that said securities were, in fact, included ; also, that defendants have not rendered an account of the transactions, save that defendant Brooks stated by telegram that he had paid for the securities \$42,280 ; that no transfer has been made to plaintiff of any right or interest in the additional securities so claimed to be included, or in the agreement of purchase ; that defendant Brooks offered no evidence on the trial as to the amount paid by him on the purchase. The referee refused to find or pass upon these facts, on the ground that it did not appear to him to be material.

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On the trial defendant Brooks was sworn on his own behalf for the purpose of showing that he did not obtain the additional securities. On his cross-examination he was asked as to the sum he actually paid for the property purchased. This was objected to and excluded on the ground that it was not within the range of a cross-examination.

The further material facts appear in the opinion.

Albert Stickney for appellant. The fact of a common adventure, taken in connection with the fact that the management of the adventure has been intrusted to one party, entitles either party, in case of a difference, to maintain an action for an accounting. (Story's Eq. Jur., § 466.) It is not necessary that the parties should have been partners. (*Marston v. Gould*, 69 N. Y. 224, 225.) It lies for single transactions where there has been no long series of items. (*Dyckman v. Valiente*, 42 N. Y. 549; *Whiton v. Spring*, 74 id. 169; Story's Eq. Jur., § 463; *Mackenzie v. Johnston*, 4 Madd. 373.) It is not necessary that there should be mutual accounts. (*Shepard v. Brown*, 4 Gifford, 208; *Hemings v. Pugh*, id. 456; Story's Eq. Jur., § 458.) Nor is it necessary that the plaintiff should first establish that there is any thing due him. (*Cheesman v. Wiggins*, 1 T. & C. 595; 1 Daniell's Ch. Pl. [5th Am. ed.] 857; 1 C. E. Green; 1 Russ. Ch. 110.)

George H. Adams for respondent. The claim that, as between Marvin and Brooks, there was a partnership, or quasi partnership, is not sustained by the evidence. (Pars. on Part. 44, 47; *Coop v. Eyre*, 1 H. Bl. 37; *Gibson v. Lupton*, 9 Bing. 297; *Hoar v. Dawes*, 1 Doug. 371; *Ward v. Gaunt*, 6 Duer, 257; *Finkle v. Stacy*, Select Cases in Chancery, 27.) The very foundation of the jurisdiction of a court of equity to take an accounting is, with some few exceptions, that a bill of discovery is brought. (Story's Eq. Jur., §§ 458, 459; *Fowle v. Lawrason*, 5 Peters, 494, 502; *Navalshaw v. Brownrigg*, 1 Sim. Ch. [N. S.] 573, 584; *Blyth v. Whiffin*, 27 L. T. Eng Ch. 330; *Smith v. Leveaux*, 2 DeG., J. & S. 1; *Salter v.*

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Ham, 31 N. Y. 321; *Hazard v. Hazard*, 1 Story's C. C. 371.) The plaintiff's claim that, technically, he can have his action for account, because of the relationship of the parties, no matter whether or not, after the accounting, he may be entitled to any relief, cannot be sustained. (*G. W. Co. v. Conliffe*, 43 L. J. Ch. 741; 1 Daniell's Ch. Pr. 857, *n.*; *Campbell v. Campbell*, 4 Halst. Ch. 743.) The referee was right in refusing to allow the plaintiff to cross-examine the defendant Brooks upon matters not entered into on his direct examination, (1 Greenleaf's Evidence, § 445; *Houghton v. Jones*, 1 Wall. 702, 706; *Rock v. Meiner*, 2 J. & S. 158, 160; *Bears v. Copley*, 10 N. Y. 93; *Union B'k v. Mott*, 39 Barb. 180, 185; *Neil v. Thorn*, 88 N. Y. 270, 275.)

FINCH, J. There has been no accounting in this case such as a court of equity awards when it determines that such relief is proper. The finding of the referee that Brooks had fully accounted for the stock and bonds and the purchase-price of the same, must be understood in connection with the theory of the report that Brooks was to purchase the whole of the stock and bonds, and then one-half of each was to be delivered to and "become the property of" the plaintiff, "on his paying therefor one-half of the purchase-money." That view of the transaction makes it an ordinary contract of purchase and sale, having in it no element of agency with trust and confidence reposed, and leaves the plaintiff to his legal remedy and with no right to an accounting in equity. Such an accounting, when decreed between parties standing in a confidential relation, and followed by proof of money or property intrusted to the agent, throws upon the latter the burden of rendering an account and an explanation, and requires him to show that his trust duties have been performed and the manner of their performance. Such a decree proceeds upon the ground that the defendant stands in the attitude of an agent dealing to some extent with the money or property of the other party; intrusted in a confidential relation with an interest which makes him a *quasi* trustee, and by reason of that relation knowing what the

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other party cannot know, and bound to reveal to him the entire truth. The equitable jurisdiction has always rested largely upon such relation of confidence, involving the need of discovery and the duty of explanation, and hence the burden of such explanation and the proof of its truth fell, in such cases, upon the defendant whose conduct was questioned, whenever an accounting was decreed, and required of him the extreme of good faith. (3 Greenl. Ev., § 253 ; 1 Story's Eq. Jur., §§ 315, 316.)

No such result occurred in this case. No interlocutory decree for an accounting was made, and no accounting with the burden of explanation resting on the defendant was had. As to the two material facts of which in the complaint the plaintiff averred his ignorance, whether the property delivered was the whole of the property bought, and whether the purchase-price represented was the actual purchase-price paid ; questions which on an accounting in equity Brooks would have been required affirmatively to answer ; as to these the trial left the original doubt undisputed. The findings of the referee, therefore, evidently mean that the plaintiff was not entitled to an accounting, and that, so far as the complaint alleged an agreement of purchase at an understood price, that contract was fully performed, and Brooks had accounted for the property bought.

If, upon the facts, the referee's view of the nature of the transaction was a correct one, his conclusion and that of the General Term were right ; but if the dealing between the parties was something different from that, and of such a character as to entitle the plaintiff to a decree for an accounting, then the dismissal of the complaint was wrong. We are thus conducted to an inquiry into the nature of the transaction.

If at first it is possible to say that before Brooks went to Detroit there was merely an agreement of purchase and sale, and a relation of debtor and creditor ; that Brooks was to buy for himself, and then as owner sell one-half to Marvin, upon the contingency of an original price less than \$50,000, though that theory is shaken and qualified by the understanding of a

joint interest, by the assurance that Marvin was to be in "on the hard pan," and by the offer to participate equally in the enterprise; if at first the true nature of the agreement was doubtful and debatable, it ceased to be so when Brooks reached Detroit, and a new series of events occurred, throwing light upon the understanding. Brooks conducted his negotiations for the purchase through Darling & Co., who dealt with Potter, the executor having control of the Ward interest. Nothing indicates that Darling & Co. were any thing else than the agents or brokers of Brooks. Besides the stock and bonds, a stock-note of \$28,000 of the old Silver Islet Mining Company, and three hundred and sixty-four shares of the stock of the Ontario Mineral Lands Company were supposed, both by Brooks and Marvin, to belong to and form a part of the Ward interest, intended to be purchased. On the 26th of September Brooks telegraphed that a contract of purchase had been made with Potter at the price of \$45,000; that fifteen per cent was to be paid down that day, and that the balance would be subject to draft with the securities attached. But the dispatch did not stop here, as it would have done if Marvin had no interest except to buy of Brooks when the latter had become owner. He adds a request that Marvin would deposit his share of the down payment in the American Exchange Bank, and have it telegraphed to the Second National Bank of Detroit, and explains that he, Brooks, will deposit "for Boston account here;" that is, will provide on the spot his half of the down payment. Not getting an immediate answer, Brooks on the same day telegraphs again: "Answer something. Will take one-fifth of *your half* if desired." These dispatches put Marvin in the position of a joint purchaser. If he was to buy of Brooks, after the latter had become owner, he could see and know what securities Brooks in fact had to sell, and judge or ascertain, before parting with his money, whether they constituted the whole of the Ward interest, and whether the price demanded was the true half of that paid. But now he is called on to buy of Potter one-half of the Ward interest at one-half of \$45,000, asserted to be the price demanded, and to part

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with his money before he knows what that interest is, and in sole reliance upon the good faith of Brooks as to price. The latter becomes Marvin's agent for the purchase of one-half of the property, and asks to be intrusted with Marvin's money to be employed in carrying out the purpose of the agency. Marvin observes the peculiarity of the situation, and asks two questions, made necessary by the demand upon him. He inquires if the Ward interest includes "explicitly" the stock-note, and the three hundred and sixty-four shares. He is answered that every interest is included. He inquires when the balance is to be paid, and is told, in five days. Thereupon he remits to Brooks, as requested, on the same 26th day of September, the sum of \$3,375, being the one-half of the required down payment. Stopping here, we cannot fail to see that new elements mark the character of the transaction. Through Brooks, acting as his agent, and in reliance upon Brooks, both as to what is bought, and what is to be paid, Marvin has become the purchaser of one-half of the Ward interest from Potter, and parted with his money to the agent, to be by him applied upon that purchase. The case becomes more than a mere agency. It becomes one in which the agent is intrusted with the principal's money, to be expended for a specific purpose. The agent takes the fund in trust, to appropriate it to the directed purchase. Whether he did so actually appropriate it, Marvin does not know from any proof, evidence, or voucher. Brooks has said so in his unsworn account rendered, and that is all. Marvin has been forced to stand in the litigation with the burden on himself of showing a misappropriation by Brooks. He has never been allowed the right of requiring Brooks to prove how, and in what manner, he performed the trust duty assumed. Had he a right to demand that remedy, and by an accounting shift so much of the burden of proof to the agent, and require him to show, by competent evidence, what became of the money confided to his care? It is best, perhaps, before answering this question, to follow the transaction to its close, and understand it in all its scope. There was some difficulty in making up the balance of the purchase-money

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to meet the expected draft. Mifflin, who was to furnish \$15,000 upon the Brooks half, was slow, and Marvin deposited \$38,500 to meet the expected draft, having been requested by Brooks to see that the funds were supplied. Before the draft arrived the \$15,000 was deposited, and replaced so much of the sum provided. The draft came. It was drawn by Brooks upon the Exchange Bank, and payable to the order of Darling & Co. But the latter were not the vendors. The answer alleges that they were, but every telegram and letter of Brooks asserts the contrary; his statement of account shows Darling & Co. furnishing part of the down payment, to be paid to Potter on the Brooks and Marvin purchase; and the referee correctly finds that Brooks bought of Potter "through Darling & Co." It is quite probable that the vendor, when trusting this firm with possession of the securities, held them responsible for the purchase-money, but when they received it on the draft they took it, not as the vendors, but for and in behalf of Brooks, and by his direction, and for the purpose to which Brooks was bound to apply it. So that the transaction was in legal effect again that Brooks was intrusted with Marvin's money, to be by him "through Darling & Co.," appropriated to the payment of the vendor.

But attached to the draft were the securities. The stock-note and Ontario shares were not among them; and it is said Marvin paid his money for precisely what was delivered, and knew exactly what he was getting for his payment. But that is not true, for two reasons. The draft was dated October 4, and paid the next day. Four days earlier Brooks had written "I will collect the \$28,000 note," and under date of October 2, Brooks had added to the order which he sent Marvin for the latter's share of stock and bonds, the statement "Potter is to furnish note and Ontario stock." Marvin had a right, therefore, to assume that he was paying his money for something more bought than was delivered, and directing the bank to pay, expressly reserved his right as against other parties to demand the balance of his purchase. It seems to us, therefore, beyond reasonable question that Brooks was the agent of Mar-

vin to purchase for him of Potter the one-half of the Ward interest, whatever that in fact might prove to be beyond what was certainly known; that the agent was to pay for such half precisely what he himself paid for the remaining half but not to exceed \$25,000; that the agent was intrusted with the money of the principal to be used in effecting such purchase; and that whether he so applied the whole of it, and what the securities bought really were, the agent accurately knew and could readily explain, while the principal could not know, except as the result of investigation and inquiry. We think such a case justifies a resort to equity and a decree for an accounting.

The basis and extent of the equitable jurisdiction over matters of account appears to have been seldom considered in our courts, but often discussed in the English authorities. We have been referred to many of these, but they seem to us not harmonious, and occasionally difficult to reconcile. (*Phillips v. Phillips*, 9 Hare, 471; *Dinwiddie v. Bailey*, 6 Ves. 139; *Mackenzie v. Johnston*, 4 Mad. 374; *King v. Rossett*, 2 Y. & Jerv. 33; *Massey v. Banner*, 4 Mad. 416; *Padwick v. Hurst*, 18 Beav. 575; *Navulshaw v. Brownrigg*, 2 DeG., M. & G. 441; *Makepiece v. Rogers*, 11 Jur. N.S. 314; *Barry v. Stevens*, 31 Beav. 258; *Foley v. Hill*, 2 H. of L. Cas. 28; *Moxon v. Bright*, L. R., 4 Ch. App. Cas. 292.) The best considered review of the authorities puts the equitable jurisdiction upon three grounds, viz.: The complicated character of the accounts; the need of a discovery, and the existence of a fiduciary or trust relation. (1 Story's Eq. Jur., § 459, and note 5.) The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity. But the jurisdiction of the latter court over trusts and those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established. But the existence of a bare agency is not sufficient. If it was, it would draw into equity every case

of bailment in which an account existed. In *Moxon v. Bright* (*supra*), it was said that there are "numerous cases showing that where the relation of principal and agent had imposed a trust upon the agent, the court would entertain a bill for an accounting, and the only difficulty was in determining what constituted this species of trust." In *Foley v. Hill* (*supra*), the question arose over that sort of relation which exists as between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added, however, that as between principal and factor the equitable jurisdiction attached, because the latter partook of the character of a trustee, and that "so it is with regard to an agent dealing with any property * * and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction," and, therefore, equity has jurisdiction. Something to the same general purport was said in this court. (*Marston v. Gould*, 69 N. Y. 225.) An accounting is always proper in cases of partnership, yet where the parties were not partners, but the relation existing was that of a *quasi* partnership, and the position of the party sued involved "the same trust, duties and obligations," the right to an accounting was declared. To the same effect are other authorities. (1 Story's Eq. Jur., § 463; *Shepard v. Brown*, 4 Giffard, 208; *Hemings v. Pugh*, *id.* 456.) In this case Brooks stood relatively to Marvin as his agent to purchase for him one-half of the Ward interest, and when intrusted with Marvin's money to be so applied, at a price to be by him determined, and to cover the whole of an unknown interest, he stood in a fiduciary relation, and became a *quasi* trustee of the money in his hands and of the property purchased, and Marvin has the right to call him to account in equity. The court, therefore, erred in dismissing the complaint, and in refusing to make the findings which would have shown the agency and that no accounting had been had.

The judgment should be reversed, the reference discharged and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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Statement of case.

DAVID W. BALDWIN, Appellant, v. JOHN F. MOFFETT et al., as Trustees, etc., et al., Respondents.

S. executed certain bonds and a trust mortgage to secure the same; plaintiff took a portion of said bonds at a discount of five per cent, under an agreement that "sufficient of the sum advanced should be used to pay a prior mortgage on the premises;" this was done and the prior mortgage canceled of record. In an action brought to foreclose the trust mortgage it was adjudged that plaintiff's bonds were usurious and void. Plaintiff thereupon brought this action asking to be subrogated to the rights of the prior mortgagee, and to foreclose the prior mortgage. *Held*, that as plaintiff had no right of subrogation save under the agreement to pay off said mortgage, and as that was part of and could not be separated from the usurious agreement, the action was not maintainable.

Patterson v. Birdsall (64 N. Y. 294), distinguished.

(Submitted October 22, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made December 30, 1881, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 26 Hun, 209.)

This action was brought to obtain a judgment reviving a mortgage upon certain premises formerly owned by defendant Wooster Sherman, subrogating plaintiff to the rights of the mortgagee, and for a foreclosure of said mortgage.

The referee found in substance the following facts: In September, 1875, said defendant Sherman executed forty bonds of \$500 each, bearing interest, and for the purpose of securing payment thereof, executed to defendants Moffett and Gilderoy, as trustees for the bondholders, a mortgage upon certain premises owned by Sherman, upon which premises there was at that time a prior mortgage held by one Appleby, on which there was unpaid, April 1, 1876, \$6,067.89. Twenty-five of these bonds were sold and transferred by Sherman for full value. In March, 1876, Sherman's agent sold and transferred to plaintiff the remaining fifteen bonds "upon the usurious agreement that plaintiff should have the same at a discount of five per cent

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from the face value," and that out of the money paid for said bonds the agent should see that Sherman paid the prior mortgage and caused the same to be discharged of record. Plaintiff gave to the agent his check for the amount of the bonds, less the discount. The check, with the bonds, was delivered to a bank of which the agent was president, who thereupon caused the Appleby mortgage to be paid and satisfied, and it was discharged of record. The check was then charged to plaintiff and credited to Sherman, who was charged with the amount paid on the Appleby mortgage, and the fifteen bonds were delivered to plaintiff. The trustees named in the mortgage subsequently brought an action to foreclose the same, the defense of usury was interposed as to the bonds held by plaintiff, and said bonds were adjudged to be usurious and void. The referee found, as conclusion of law, that plaintiff was not entitled to be subrogated, and so dismissed the complaint.

Mullin & Griffin for appellant. At the time plaintiff made the agreement to pay off the prior mortgage he was a subsequent incumbrancer, and as such, was entitled to maintain this action. (*Patterson v. Birdsall*, 6 Hun, 632, 640, 643; 64 N. Y. 298.) It cannot make any difference with the equitable rights of the plaintiff in this action, that instead of paying his money directly to the holder of the mortgage he seeks to revive, he paid it to the mortgagor, or his agent, under an agreement with him that he should use it to satisfy the mortgage mentioned. (Jones on Mortgages, § 874; *Greene v. Mulbank*, 3 Abb. N. C. 138, 141.) The bondholders and their representative in this action, defendant Moffett, have no rights or equities as against the mortgage in question superior to those of Wooster Sherman, the mortgagor. (*Barnes v. Cumack*, 1 Barb. 392; *Payne v. Wilson*, 11 Hun, 302; *Main v. Ames*, Jefferson Special Term, 1880, 1 Barb. 392; Jones on Mortgages, § 878; *Patterson v. Birdsall*, 6 Hun, 641.) If a contract is susceptible of two constructions, one of which will bring it within the statute of usury, and the other without the statute, the latter construction will be

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adopted. (*Archibald v. Thomas*, 3 Cow. 284; *Coyne v. Weaver, etc.*, 84 N. Y. 386; 1 Chitty on Cont. [11th Am. ed.] 111.)

F. D. Sherman for respondents.

McCartin and *Williams* for *John F. Moffett*, respondent. A party paying a mortgage of another can only be subrogated to the rights of the mortgagee; where the party paying is surety for the mortgage debt, or where a subsequent incumbrancer or purchaser, in order to save his lien on the premises, is compelled to pay the prior mortgage. (*Averill v. Taylor*, 8 N. Y. 44-51; Story's Eq. Jur., §§ 635, 1227; *Sanford v. McLean*, 3 Paige, 117; *Banto v. Garmo*, 1 Sandf. Ch. 383; *Jenkins v. Con. Ins. Co.*, 12 How. 66-67; 7 Hun, 461.) The money having been paid with no intent, at the time, to keep the security on foot, it was absolutely discharged. (*Banto v. Garmo*, 1 Sandf. Ch. 383; *Lafarge v. Harter*, 11 Barb. 159-71-2; *Draper v. Toescott*, 29 id. 401.) Plaintiff cannot maintain this action, because the agreement under which the loan or payment was made was usurious, and he has to rely on such usurious agreement in making his case, and if that agreement forms one necessary link in the proof of the case or right to recover, he must fail. (*Gregg v. Weyman*, 4 Cush. 322; *Rice v. Walling*, 5 Wend. 595-99; *Dewitt v. Brisbane*, 16 N. Y. 508; *Palmer v. Pell*, 3 Seld. 328; *Schroepel v. Corning*, 5 Denio, 236; *Kellogg v. Adams*, 39 N. Y. 31-32.)

RAPALLO, J. We find it impossible to separate the agreement that the sum remaining due on the Appleby mortgage should be paid out of the \$6,375 advanced by the plaintiff, from the usurious agreement under which the advance was made. The stipulation as to the application of the money was one of the conditions upon which the money was advanced, and was part of the same agreement by which a discount of five per cent in addition to legal interest was reserved to the plaintiff. The check of the plaintiff was given to Mr. Camp in payment for the second mortgage bonds of Sherman, at five per cent discount, and it was for the purpose of making those bonds and

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the mortgage given to secure them, a first lien upon the property, that it was stipulated that the balance due on the Appleby mortgage, which was a prior lien, should be discharged with the proceeds of the check. The mere loan of the money to Sherman, or the simple purchase of the second mortgage bonds, without any agreement as to the application of the proceeds, would have conferred upon the plaintiff no right of subrogation, even if the proceeds were in fact used to pay off the first mortgage. The agreement that the first mortgage should be paid off with the plaintiff's funds was, therefore, an essential part of the plaintiff's case, and this agreement could not be established without resorting to the usurious agreement under which the plaintiff's advance was made, the agreement having been all made at one time, and being entire. The mere facts that at the time of the advance the plaintiff was a subsequent incumbrancer to the amount of \$750, and that the first mortgage was past due, and that the money of the plaintiff was used to pay off the first mortgage (if that fact was in the case) would not have been sufficient to entitle the plaintiff to be subrogated, for the payment was not made by the plaintiff to the mortgagee, but to the mortgagor or his agent, and if it be argued that the plaintiff constituted the mortgagor his agent to pay off the first mortgage, the answer is that that agency could not be shown without resorting to the usurious agreement under which the money was advanced, and claiming through the effect of that agreement. In the case of *Patterson v. Birdsall* (6 Hun, 632; S. C., 64 N. Y. 295; 21 Am. Rep. 609), this difficulty did not exist; for in that case the subsequent incumbrancer, having the right to protect his own security, himself paid off the first incumbrance. It was not necessary, for the purpose of establishing his right of subrogation, to resort to any dealing between him and his debtor. His right of subrogation sprang from the payment rightfully made by him to the holder of the first incumbrance for his own protection, and was complete without reference to any other dealing, and his taking a usurious security for his reimbursement was held not to vitiate the right of subrogation which had been thus acquired. In the present case

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the claim to subrogation arises out of the agreement between the plaintiff and Sherman, and cannot be established without a resort to that agreement, and as that link fails by reason of the usury, the claim to subrogation must fall with it.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

94	86
141	366

LEVI F. BOWEN, Respondent, v. ROBERT W. BECK, Appellant.

Where a conveyance of real estate, purporting to be an indenture and containing a clause by which the grantee assumes and agrees to pay a mortgage upon the lands conveyed, has been accepted by the grantee, it will, for the purpose of a remedy against the grantee, be considered as the deed of both parties, and the clause as a covenant.

It seems, the grantee, in a conveyance by deed-poll containing a mortgage assumption clause, upon acceptance of the deed, becomes bound as covenantor to pay the mortgage.

(Argued October 22, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made January 21, 1882, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to foreclose a mortgage executed by defendant Murphy.

The mortgagor, in 1863 and after the execution of the mortgage, conveyed a portion of the mortgaged premises to defendants Beck and Tucker. The conveyance, which purported to be an "indenture," but which was executed by the grantor only, contained a clause to the effect that the conveyance was made subject to said mortgage, which the parties of the second part assumed and agreed to pay as part of the consideration of the conveyance. Said defendants were sought to be charged with any deficiency. The defense was that any claim under the assumption clause was barred by the statute of limitations.

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Ransom & Joyce for appellant. Plaintiff, not being a party to the deed, cannot maintain an action thereon. (*Spencer v. Field*, 10 Wend. 88; *Van Alstyne v. Van Slyck*, 10 Barb. 383, 385.) An action upon the deed cannot be maintained against the grantee in a deed-poll. (*Goodwin v. Gilbert*, 9 Mass. 510; *Bowen v. Bell*, 20 Johns. 338; *Rogers v. Eagle F. Co.*, 9 Wend. 611, 618.) Although the deed begins in form as an indenture, still as it purports to be, and in fact is, only the deed of the grantor, it is a deed-poll. (Gerard's Titles to Real Estate [2d. ed.], 490.) The proper action in a case like the present is *assumpsit*. (*Rawson v. Copland*, 2 Sandf. Ch. 251, 255; *Urquhart v. Brayton*, 12 R. I. 169; *Foster v. Atwater*, 42 Conn. 244; *Pike v. Brown*, 7 Cush. 133; *Wilson v. Brechemin*, Brightly [Penna. Sup. Ct.], 445; *Huff v. Nickerson*, 27 Me. 106; *Heim v. Vogel*, 69 Mo. 529; *Gale v. Nixon*, 6 Cow. 445; *Hinsdale v. Humphrey*, 15 Conn. 431; *Goodwin v. Gilbert*, 9 Mass. 510; *Rockford, etc., R. R. Co. v. Bechemeyer*, 72 Ill. 267; *Bennett v. Lynch*, 5 B. & C. 589; *Johnson v. Muzzy*, 45 Vt. 419; *Trustees v. Spencer*, 7 Ohio, 149.) The principle of avoiding circuity of action does not apply in this case. (*Koving v. Manly*, 49 N. Y. 192, 202.) Murphy's cause of action against appellant accrued when the bond become due and remained unpaid. (*Hume v. Hendrickson*, 79 N. Y. 117, 127; *Furnas v. Durgin*, 119 Mass. 500; Jones on Mortgages, §§ 769, 770.) It is now barred by the statute of limitations, and cannot be revived by any act of his, nor can any payments hereafter made by him be regarded as paid for, or at the request of, the appellant. (*Woodruff v. Moore*, 8 Barb. 171; *Wright v. Butler*, 6 Wend. 288.)

George W. Bowen for respondent. By the covenant in the deed from Philip Murphy, the mortgagor, to the appellant Beck and his co-defendant Tucker, by which they "assumed and agreed to pay" the bond and mortgage of the plaintiff, they, Tucker and Beck, became personally liable to the mortgagee and his assignee for the payment of the same. (*Burr v. Beers*, 24 N. Y. 178.) The deed from Murphy to Beck and

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Tucker being under seal, the assumption by the grantees therein and their agreement to pay the plaintiff's bond and mortgage was a covenant on their part and as binding on them as if they had signed and sealed it. (*McRae v. Purmort*, 16 Wend. 460, 466; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Atlantic Dock Co. v. Leavitt*, 54 id. 35, 40; *Trotter v. Hughes*, 12 id. 74, 78; *Aikin v. Vt. & C. R. R. Co.*, 26 Barb. 290, 298, 299; *Spalding v. Hallenbeck*, 35 N. Y. 204, 207; *Thomas on Mortgages*, 185, 195; *Sparkman v. Gove*, 27 Alb. L. J. 33; *Finley v. Simson*, 2 Zab. 311; *Rubens v. Prindle*, 44 Barb. 336, 346; *Comstock v. Drohan*, 8 Hun, 373, 375; *Tillotson v. Boyd*, 4 Sandf. Sup. Ct. 516, 520.) Where land is conveyed subject to a prior mortgage made by the grantor, who has given his bond, and which mortgage the grantor assumes and agrees to pay, the grantee becomes the principal debtor and the grantor a mere surety for the payment of the bond debt, and on paying the bond is entitled to be subrogated to the position of the mortgagee. (*Marsh v. Pike*, 10 Paige, 595; *Johnson v. Zink*, 52 Barb. 396, 398; *Russell v. Pistor*, 3 Seld. 171, 174; *Garnsey v. Rogers*, 47 N. Y. 233; *Thomas on Mortgages*, 186.) The parties are all in court and the judgment appealed from, without circuitry of action, which the law abhors, produces precisely the same result as if Murphy had paid the bond and mortgage, and then brought his action against Beck and Tucker. (*Marsh v. Pike*, 10 Paige, 595, 597; *Cornell v. Prescott*, 2 Barb. 16; *Halsey v. Reed*, 9 Paige, 446, 454; *Comstock v. Drohan*, 71 N. Y. 9; *Johnson v. Zink*, 52 Barb. 396; *Hunt v. Amidon*, 4 Hill, 345, 347; *Rubens v. Prindle*, 44 Barb. 336-344; *Curtis v. Tyler*, 2 Paige, 432; *Ferris v. Crawford*, 2 Denio, 595.)

ANDREWS, J. The right of the plaintiff to recover in this action is not controverted, assuming that the clause contained in the conveyance of February 19, 1863, from Philip Murphy to the defendants Beck and Tucker, by which the grantees assumed and agreed to pay the mortgage from Murphy to Jackson on the land conveyed, and to which the conveyance was

subject, amounts to a covenant of the grantees to pay the mortgage. Upon that assumption the defense of the statute of limitations, which is the only defense to the action, fails. The sole question therefore is whether the defendants, Beck and Tucker, can be charged as upon a covenant to pay the mortgage. We think this point ought not to be considered an open one in this court.

The question as to the effect of a mortgage assumption clause on the part of a grantee in a conveyance by deed-poll, signed by the grantor only, was considered in *Atlantic Dock Co. v. Leavitt* (54 N. Y. 35; 13 Am. Rep. 556), and the court by EARL, Commissioner, expressed the opinion that a grantee in such a deed becomes bound, upon acceptance, as covenantor to pay the mortgage. The decision of this point may not have been essential to support the judgment in that case, but the question was carefully considered by the court, and many authorities tending to sustain the conclusion reached, were cited, as well as numerous expressions of judges in the courts of this State, recognizing the doctrine maintained in the opinion.

Under these circumstances we do not feel at liberty to examine the question *de novo*, even if as an original question we might entertain doubts in respect to it. It is admitted by Mr. Platt, who questions the doctrine, that up to his time it had been accepted without scruple by the profession (Platt on Cov. 11). It has doubtless been acted upon in this State, with at least the apparent sanction of our courts, and it would produce injustice now to reject it and establish a different rule.

We may add in support of the judgment in the case now before us that the conveyance to Beck and Tucker purports to be an indenture which according to its proper signification is a deed *inter partes* or a mutual deed. It is said in Co. Litt. 231 a, "an indenture is a writing containing a conveyance, bargain, contract, covenants or agreements between two or more." And Sir Henry Finch in his Book on the Law, 109, speaking of the different kinds of deeds, says: "Indenture — that which is the mutual deed of both." The deed in this case was accepted by the grantees as an indenture, and it does not seem to be contrary to principle to hold that for the purpose

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of the remedy it shall be regarded as an instrument of the character expressed and as the deed of both parties.

The cases in New Jersey accord with the view taken in *Atlantic Dock Co. v. Leavitt* (*supra*), *Finley v. Simpson* (2 Zab. 311), *Sparkman v. Gove* (27 Alb. L. J., 33).

We think the judgment should be affirmed.

All concur.

Judgment affirmed.

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100 389

ALBERT C. THORNE, Respondent, v. SOLOMON TURCK Appellant.

To constitute the crime of larceny there must be both a trespass and a felonious intent; where the owner of property, although induced by false pretenses, parts with possession, intending to surrender absolutely his title thereto, it is not larceny.

A person called at defendant's residence and falsely stated that certain chemical works, belonging to a company of which defendant was a director, had been destroyed by an explosion, and that he had been sent as a messenger by the manager; also that the latter had neglected to provide him with money to pay his expenses back, and at his request defendant gave him \$5 for that purpose. Defendant, supposing plaintiff to be the person, caused his arrest without a warrant. In an action for false imprisonment, *held*, that the offense committed, by the pretended messenger, was not a larceny, but the obtaining of property by false pretenses, and so was not a felony; and that the arrest was illegal.

Loomis v. The People (67 N. Y. 322), distinguished.

The complaint contained a separate cause of action for malicious prosecution. A motion by defendant's counsel to dismiss the complaint as to that cause of action was denied; as to it, however, the jury found for defendant, but rendered a verdict for plaintiff upon the first cause of action. *Held*, that the denial of the motion, even if erroneous, could have had no injurious effect, and so was not ground for reversal.

(Argued October 22, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 7, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

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The complaint in this action contained two counts, one for false imprisonment, the other for malicious prosecution.

The facts appearing are substantially as follows:

In the evening of October 29, 1880, a person called at the defendant's residence in New York city, stating that there had been an accidental explosion at the Repauna Chemical Works in New Jersey, whereof the defendant was a director; that he had been sent as messenger to notify him of this by one Apollonio, the manager, who, in the excitement of the moment, had neglected to provide him with money for expenses; that he had not sufficient money to return home; and upon his request defendant gave him \$5. On November 1, the defendant received a telegram from Apollonio, saying no accident had occurred. The following day Apollonio came to New York, and informed defendant, after hearing a description of the person, that it described exactly the plaintiff. On November 3 the plaintiff was arrested by a detective without a warrant, and at defendant's request he was confined at the police station until November 6, when he was discharged without any examination. The police court record is: "Dis. on the evidence, as there was a mistake in the identity;" which was signed by defendant. This result came from the statement of a fellow clerk of the plaintiff in the employ of Williams, Black & Co., that at the time when the interview was had by defendant at his residence with the pretended messenger the plaintiff was at work in the firm's office.

The jury found for plaintiff as to the first cause of action, and for the defendant as to the second. The further material facts appear in the opinion.

William P. Chambers for appellant. Where a felony has in fact been committed, and there was reasonable ground to suspect the person arrested, a warrant is not necessary to justify the arrest. (1 Hale's P. C. 5,888; 2 Coke's Inst. 51; 1 Chitty's Cr. L. 15; 3 Barb. Cr. L. [2d ed.] 550; *Samuel v. Payne*, Douglas, 359; *Beckwith v. Philby*, 6 B. & C. 635; *Haley v. Mix*, 3 Wend. 350; *Farnam v. Feeley*, 56 N. Y.

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451.) The taking with felonious intent, and the trespass in wrongfully converting the property of another are two of the distinctive characteristics of larceny. (*People v. Call*, 1 Denio, 122; *Hildebrand v. People*, 56 N. Y. 393; *Regina v. McKall*, 11 Cox's C. C. 32; *Rex v. Murray*, 1 Moody's C. C. 276; *Smith v. People*, 53 N. Y. 113; *Loomis v. People*, 67 id. 327.) Even where the money is voluntarily delivered to the wrongdoer in faith that he, himself, will return it, and thus some credit is placed upon his personal responsibility, it is larceny. (*Loomis v. People*, 67 N. Y. 327; *Regina v. Horner*, 1 Leach, 305; *Rex v. Robson*, R. & R. C. C. 413.) If money or property is delivered by the owner to a person for mere custody, or charge, or for some specific purpose, the legal possession remains in the owner, and a criminal conversion of it by the custodian is larceny. (*People v. McDonald*, 43 N. Y. 64; *Justices v. People, ex rel. Henderson*, 90 id. 12; Whart. Cr. Law [6th ed.], § 813; *Collins v. Ralli*, 20 Hun, 246; 85 N. Y. 637; *Zink v. People*, 6 Abb. N. C. 424, note 413-14; *Ward v. People*, 3 Hill, 398.) To take the offense out of the definition of larceny, it is necessary that the owner should have consented "to part with the property and not the naked possession for a special purpose." (*Bassett v. Spofford*, 45 N. Y. 391; *Weyman v. People*, 4 Hun, 311; 6 N. Y. Sup. Ct. 698; 62 N. Y. 623.) He must have parted with possession of his property with intent to pass the title to the wrongdoer. (*Barnard v. Campbell*, 58 N. Y. 76.) Petit larceny was a felony at common law. (4 Blackst. Com. 99; 1 Hawk. P. C. chap. 33, § 4; 1 Hall's P. C. 43; *People v. Finn*, 26 Hun, 59.) Prior to the time this money was taken, no statute of this State had changed the character of the offense. (*People v. Finn*, 26 Hun, 59; *Ward v. People*, 3 Hill, 395; *Carpenter v. Nixon*, 5 id. 262.) The Revised Statutes do not assume "to define the meaning of the term 'felony'" except when used in a statute. (*Fassett v. Smith*, 23 N. Y. 257.) The common-law rule that petit larceny is a felony has not been changed by the Revised Statutes, and it remains in force as to all questions controlled solely by the common law. (*People*

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v. *McArdle*, 1 Wheeler's Cr. Cas. 101; *People v. Adler*, 3 Park. Cr. L. 249.) The question of probable cause or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting. (*Burns v. Erben*, 40 N. Y. 466; *Bulkley v. Keteltas*, 6 id. 387; *Ileyne v. Blair*, 62 id. 22; *Thaule v. Krekeler*, 81 id. 428; *Wallace v. Mayor, etc.*, 9 Abb. 44; *Erben v. Lorillard*, 19 N. Y. 302-3; *Arthur v. Griswold*, 55 id. 408.) Even if the arrest, without a warrant, gave plaintiff a technical cause of action, no punitive damages were recoverable. (*Wallace v. Mayor*, 9 Abb. 44; *Taylor v. Church*, 8 N. Y. 457-460; *Littlejohn v. Greeley*, 13 Abb. 57; *Williams v. Garrett*, 12 How. 457.)

Nathaniel C. Moak for respondent. Obtaining money by false pretenses does not constitute a felony. (3 R. S. [Banks' 6th ed.] 948; *Ranney v. People*, 22 N. Y. 413, 416-17; 2 R. S. 1677, § 53; 2 Edm. 697; *Shay v. People*, 22 N. Y. 317; *Fassett v. Smith*, 23 id. 252; *Mowrey v. Walsh*, 8 Cow. 238; *People v. Park*, 41 N. Y. 24; *Loomis v. People*, 67 id. 322, 326, 329.) No felony having been committed, the arrest of plaintiff by defendant, or through his procurement, without a warrant, was illegal, and furnished a good cause of action for false imprisonment, without regard to the questions of probable cause or reasonable ground for suspicion against plaintiff; and the court committed no error in holding that the only question for the jury on the first cause of action was one of damages. (*Burns v. Erben*, 40 N. Y. 463, 466, 468; *Meyer v. Clark*, 41 N. Y. Supr. Ct. 107; *People v. Pratt*, 22 Hun, 300, 301.) The court will not set aside a verdict on the ground that the damages are excessive unless it is convinced that they are. (*Coleman v. Southwick*, 9 Johns. 45; *Gale v. N. Y. C., etc., R. R. Co.*, 13 Hun, 1; *Bierbauer v. N. Y. C., etc., R. R. Co.*, 15 id. 559.) It was discretionary with the judge below whether to grant or refuse a new trial on this ground. (*Cheney v. N. Y. C. & H. R. R. Co.*, 16 Hun, 415; *Litchut v. Treadwell*, 18 Alb. L. J. 39.) Although the General

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Term has power to review such discretion, still it will not interfere therewith unless it clearly appears to have been arbitrarily exercised. (*Cheney v. N. Y. C. & H. R. R. Co.*, 16 Hun, 415.) This court cannot review the question of excessive damages. (*Metcalf v. Baker*, 57 N. Y. 662; *Gale v. N. Y. C. & H. R. R. Co.*, 76 id. 594; *Oldfield v. N. Y. & H. R. R. Co.*, 14 id. 310, 319, 321; *Young v. Dows*, 30 id. 134; *Van Schaick v. Third Ave. R. R. Co.*, 38 id. 353; *Ostrander v. Fellows*, 39 id. 350; *Standard Oil Co. v. Amazon Ins. Co.*, 79 id. 510.)

MILLER, J. The complaint in this action alleges two causes of action. *First*, for false imprisonment in procuring plaintiff's arrest without a warrant for the alleged offense of stealing and carrying away money of this defendant by trick and device; *Second*, for malicious prosecution in preferring a charge for the same offense.

There was sufficient proof upon the trial to establish the fact that the plaintiff was illegally arrested without a warrant, and we think there was no error in the refusal of the judge to dismiss the complaint as to this cause of action. The motion to dismiss was based upon the ground that a felony had been committed, and that there was reasonable ground to suspect that the plaintiff was the guilty party, and under these circumstances that no warrant was necessary to make the arrest. The evidence showed that the defendant was a director in the Repauno Chemical Works situate in New Jersey; that a person, whom he supposed was the plaintiff, came to the defendant's house in New York and represented that he had been sent there by the superintendent of the works to inform him that the glycerine factory at the works had exploded, destroying the lives of two men and the factory also; he stated that he had not received money enough to pay his expenses and that he required \$4 or \$5 to take him back, and defendant, believing his statement, gave him \$5 to pay his expenses. The statement made to defendant was false, and the defendant, caused plaintiff's arrest in consequence thereof. The appellant claims

that the offense was larceny, and that the money was taken from the defendant with a felonious intent and converted to his own use by the plaintiff. To constitute the crime of larceny there must be a trespass committed and a felonious intent, and without these elements no such offense can be made out. We think that the offense proven was not one of larceny, but merely one of false pretenses, and came within the provisions of section 58, 3 Revised Statutes (6th ed.), page 948, which declares that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, * * * obtain from any person any money * * * upon conviction shall be punished," etc. In *Fussett v. Smith* (23 N. Y. 252) it was held that a violation of the provisions of the statute cited was not a felony either at common law or under the statute. The distinction which exists between larceny and false pretenses is a very nice one, but no case has gone to the extent of holding that money obtained in the manner and under the circumstances shown in this case constitutes the crime of larceny. The money here was voluntarily parted with by the owner for the purpose of being expended in the payment of the expenses of the person who obtained it. It was not to be kept for the benefit of the owner or to be returned to him, and no right was retained to the same. The most that can be said as to the owner's right to the money is that there was a promise to pay back to him the same amount.

It was procured by direct artifice or device within the statute, and no trespass was committed against the owner. Neither can it be said, we think, that in law there was an *animus furandi* on the part of the person procuring the money. The case of *Loomis v. People* (67 N. Y. 322; 23 Am. Rep. 123) is relied upon by the counsel of both sides, but we think it falls far short of holding that the obtaining of money upon a false representation, with an absolute surrender of the title to the same, constitute the crime of larceny. In that case the money was parted with for a specific purpose and without any intention of parting with the title to the same. It is there laid down that, "even although the owner is induced to part with

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his property by fraudulent means, yet if he actually intends to part with it and delivers up possession absolutely, it is not larceny;" and further it is said "it will be observed that the intention of the owner to part with his property is the gist and essence of the offense of larceny and the vital point upon which the crime hinges and is to be determined." Within the rule laid down it is apparent that there was an intention to part absolutely with the money in the case at bar, and it, therefore, cannot be claimed that the case cited sustains the position contended for by the appellant's counsel. In the case last cited it is stated that if a person *animus furandi* avail himself of the temporary possession of property, obtained by consent for a special purpose, to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. This has no application to a case where the property has been parted with absolutely, as is the fact here.

In the other cases cited by the appellant's counsel there was a temporary parting with the property for some specific purpose and they are not directly in point.

As no larceny was committed it is not necessary to consider the question as to whether petit larceny is a felony.

The refusal of the court to dismiss the complaint as to the second cause of action was not, in view of all the facts, such a ground of error as would authorize a reversal of the judgment.

In this respect the judge left it for the jury to say whether there was probable cause, and he charged them "that if they believed that Mr. Turck was under the honest supposition that this was the culprit who had taken his money, and it was a reasonable supposition, that it was such a conviction that a man of ordinary prudence would have entertained, and that there was reason and probable cause for Mr. Turck's supposing that this was the culprit, that would be the end of the plaintiff's action as to the second cause of action." We think that as the second cause of action was distinct from the first, the jury could not have been prejudiced by the submission of the same to them in the form in which it was presented by the judge, and that its dismissal would not have aided the defendant in

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reference to the first cause of action. The jury having found in favor of the defendant in reference to this branch of the case, it may be assumed that they disregarded all matters relating to the second cause of action in disposing of the first.

By their verdict they found no want of probable cause in making the charge and that it was not made with a malicious intent, and it would be going very far to hold that they permitted either of these questions to influence their verdict in reference to the first cause of action. They were merely called upon under the judge's charge to assess the damages as to the first cause of action, if they found the second was not sustained, and it is not apparent how any injury could have accrued to the defendant by the refusal of the judge to dismiss the complaint upon the ground referred to. It being manifest that the jury could not have been prejudiced even if the judge erred in regard to the motion to dismiss the complaint as to the second cause of action, we are not called upon to reverse the judgment upon that ground.

In regard to the damages the case does not disclose that any point was made as to the right of the plaintiff to recover for punitive or exemplary damages and it is not presented by any exception upon the trial. This court has no authority to review the question as to excessive damages, and we are, therefore, not called upon to determine whether the damages recovered by the plaintiff were larger than were warranted by the testimony.

There was no error on the trial and the judgment should be affirmed.

All concur.

Judgment affirmed.

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WILLIAM R. WELLING, Appellant, v. GILBERT D. RYERSON,
Respondent.

GILBERT D. RYERSON, Respondent, v. WILLIAM R. WELLING,
Appellant.

The rule that one who has purchased and received a conveyance of a portion of mortgaged premises may require that all of the balance shall first be sold to satisfy the mortgage, before resort shall be had to his portion, applies, although part of the residue is situated in another State

J. executed a mortgage upon his farm, a portion of which was situated in this State, the residue in New Jersey; he subsequently conveyed to R. five acres of that portion situate in this state, and thereafter executed another mortgage upon the whole farm. The owner of the two mortgages commenced foreclosure suits, one in this State to foreclose the first mortgage, another in New Jersey to foreclose both. In the first suit judgment was rendered, directing sale of the land in this State, without reference to that in New Jersey, and providing that the portion not sold to R. should be first sold. Pending proceedings to enforce the judgment, the grantee of R. tendered to the plaintiff in the foreclosure suit the amount due on his mortgage, with costs, and demanded an assignment of the mortgage, or a release of his land, which was refused. In an action brought to compel such assignment, *held*, that said grantee was entitled to the relief sought; and, it appearing that the two foreclosure judgments had been executed by sale of all the farm, save that sold to R., and that the amount realized therefrom was more than sufficient to pay the first mortgage, with all costs of foreclosure and sale, that R.'s grantee was entitled to have his land released and discharged from any liability.

(Argued October 18, 1883; decided November 20, 1883.)

THESE are appeals, one in each of the actions above entitled. In the first action the appeal is from an order of the General Term of the Supreme Court, in the second judicial department, made December 12, 1881, which affirmed an order of Special Term, directing that upon payment by defendant, Ryerson, of the amount due upon the bond and the mortgage, to foreclose which the action was brought, and of the foreclosure costs, plaintiff assign said bond, mortgage and judgment to Ryerson, and that the latter be subrogated to all the rights of the plaintiff.

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The appeal in the action secondly above entitled is from a judgment of said General Term, entered upon an order made December 12, 1881, which affirmed a judgment in favor of the plaintiff, entered upon a decision of the court on trial at Special Term. The judgment gave substantially the same right of subrogation as was given by the order.

Upon the first application for the order it was denied without prejudice to the right of Ryerson to bring an action to obtain the relief sought. The action in his behalf was thereupon commenced. Afterward a reargument of the motion was directed, and upon the reargument the motion was granted, the order declaring that nothing therein contained should prejudice or affect the action.

The material facts are stated in the opinion.

Theodore F. Miller for appellant. Where the senior and junior liens are not co-extensive, equity requires the senior to dispose first of the fund not covered by the junior lien, and to resort only to the fund of the latter in case of a deficiency. (*Lanay v. Athol*, 2 Atk. 446; *Gibson v. Seagrim*, 20 Beav. 614; *N. Y. & N. J. Steamboat Co. v. Jersey Co.*, Hopkins' Ch. 522.) Where it works an injustice to the senior incumbrancer, the court will not direct subrogation, or direct a sale in the inverse order of alienation. (*Sheldon on Subrogation*, 69; *Woolcocks v. Hart*, 1 Paige, 185; *Herriman v. Skillman*, 33 Barb. 378.) The rule requiring the holder of a lien on two funds, where another party has a lien on one only, to exhaust his remedy first against the fund upon which there is only one lien, must be applied even where the fund upon which the single lien rests is, in whole or in part, in another State. (*N. Y. & N. J. Steamboat Co. v. Jersey Co.*, Hopkins' Ch. 525-532.) The appellant's rights under his second and third mortgages are the same as if Jeffers had made them to a stranger, and the stranger were now asserting them. (*Cornell v. Woodruff*, 77 N. Y. 203; *Ten Eyck v. Craig*, 62 id. 421.) A person claiming subrogation must have superior equities. (*Harrisburg B'k v. German*, 3 Penn. 300; 2 Bouv. Law Dict. 555.) Subrogation has never

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been granted where it interferes with the rights of others. (*Banto v. Garmo*, 1 Sandf. Ch. 383.) Nor where it interferes with equities of the creditor against whom it is claimed. (*Grubbs v. Wysox*, 21 Alb. L. J. 517.) The tender was insufficient as it included only the amount due on the first mortgage and the costs of the New York suit. (*Enright v. Hubbard*, 34 Conn. 197.) The recording of the deed in New York did not affect the rank or lien of the second mortgage as such in New Jersey. The recording acts are State laws, and, as such, have no extra-territorial force. (*W. U. Tel. Co. v. Kilderhouse*, 87 N. Y. 430; *Van Voorhis v. Brintnall*, 86 id. 18-29.) To entitle one creditor to be subrogated to the right of another creditor, the former must have satisfied the latter his demand in full, so as to relieve him of trouble, expense and work. (*Carter v. Neal*, 24 Ga. 346; Sheldon on Subrogation, 75.) Welling's second mortgage was, as to New York lands, a lien prior to the Ryerson deeds, for the latter were not properly acknowledged, and were not entitled to record. (*Fryer v. Rockefeller*, 63 N. Y. 268; *Miller v. Link*, 2 T. & C. 86; 3 R. S. [7th ed.] 2217, § 9; id. 2218, § 15.) Public policy and the provisions of the statute require that no instrument affecting realty should be recorded unless the officer certifies either that he knows the party, or is satisfied by evidence. The court will take judicial notice of the fact. (*Troup v. Haight*, Hopkins' Ch. 305; *Fryer v. Rockefeller*, 63 N. Y. 273; *Jackson v. Gumaer*, 2 Cow. 552; *Duval v. Cowenhoven*, 4 Wend. 561; *Merriam v. Harsen*, 4 Edw. Ch. 70; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Canandaigua Academy v. McKeehan*, 19 Hun, 62; *Jackson v. Livingstone*, 6 Johns. 149; *Ritter v. Worth*, 58 N. Y. 627.)

Henry Bacon for respondent. The defendant was entitled to redeem his land, and after paying plaintiff's debts, to have an assignment of and be subrogated to all the rights of plaintiff under his first mortgage. (*Hayes v. Ward*, 4 Johns. Ch. 123; *Matthews v. Aikin*, 1 N. Y. 595; *Edson v. Dillaye*, 17 id. 158; *Barnes v. Mott*, 64 id. 397; *Cole v. Malcolm*, 66 id.

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363; *Frost v. Yonkers S'v'gs B'k*, 70 id. 553; *Twombly v. Cassidy*, 21 Hun, 277; *Averill v. Taylor*, 8 N. Y. 44.) The fact that the other mortgages were given after the deed to defendant, and are not liens upon his land, can in no way affect the defendant's right to redeem or be subrogated. (*McLean v. Tompkins*, 18 Abb. 24; *Nat. B'k of Lansingburgh v. Silliman*, 65 N. Y. 475.) In order that a decision should become *res adjudicata*, so as to be a bar to a subsequent proceeding or action, it must be shown, by the party insisting upon such decision, that the record of the former suit includes the matters alleged to have been determined. (*Campbell v. Butts*, 3 N. Y. 173; *Boon v. Moss*, 70 id. 465.) Under the circumstances the order appealed from was no bar to this action. The plaintiff had the right to commence such an action instead of making a motion in the original action. (*Johnson v. Zink*, 51 N. Y. 333.) Plaintiff having alleged the due acknowledgment of the deeds, and defendant not having denied it, that fact is to be taken as true in this action. (Code, § 522; *Meeker v. Wright*, 76 N. Y. 262.) That these deeds were duly acknowledged is *res adjudicata* between these parties. (*Demarest v. Darg*, 32 N. Y. 281; *Kingsland v. Spalding*, 3 Barb. Ch. 341.) It is not necessary that the acknowledgment should follow the exact language of the statute, so long as it substantially complies with its requirements. (*Jackson v. Livingston*, 6 Johns. 149; *Ritter v. Worth*, 58 N. Y. 627.) The fact that the deed of Ryerson to the respondent was not recorded until after the defendant's subsequent mortgages had been, does not affect the question in issue here. (*Frost v. Yonkers S'v'gs B'k*, 70 N. Y. 552; *Vandercook v. Cohoes S'v'gs Inst.*, 5 Hun, 641; *Hooker v. Pierce*, 2 Hill, 650; *Wood v. Chapin*, 13 N. Y. 509; *Greene v. Deal*, 4 Hun, 703; *Page v. Waring*, 76 N. Y. 463.)

EARL, J. On the 23d day of March, 1871, George Jeffers was the owner of a farm consisting of about five hundred acres of land, a portion of which was situated in the county of Orange, in this State, and the remainder in the adjoining State of New Jersey; and on that day he executed a mortgage upon

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the whole of the land to secure the payment of \$15,000, which was recorded in Orange county on the same day. On the 31st day of March, 1876, he conveyed to John F. Ryerson about five acres of that portion of the land which was within Orange county, by a deed dated on that day and recorded in that county on the 26th day of May thereafter, and on the same day that grantee conveyed the same land to his son, the present respondent. On the 26th day of April, 1876, Jeffers executed another mortgage upon the whole farm to secure the payment of \$4,600, which was recorded in Orange county on the 29th day of May thereafter. Welling, the present appellant, became, by assignment, the owner of these two mortgages, and thereafter, October 9, 1877, he took from Jeffers another mortgage upon the same farm, excepting the portion thereof conveyed to Ryerson as above stated, to secure the payment of the sum of \$4,400, which was also recorded in the county of Orange.

In June, 1880, Welling commenced foreclosure proceedings by suits both in New York and New Jersey. The New York suit was to foreclose the first mortgage, Ryerson being made one of the defendants, and on the 29th day of September, 1880, a judgment was rendered therein directing the sale of the lands situated within this State, without reference to the New Jersey lands, and providing that the land not conveyed to Ryerson should be first sold, and that his land should be sold only in case the other land should not sell for enough to satisfy the judgment and costs. The New Jersey suit, to which Ryerson was not a party, was to foreclose the three mortgages, and resulted in a foreclosure judgment on the 5th day of October, 1880, directing the sale of the lands situated in New Jersey.

While Welling was proceeding to execute the judgment in this State, Ryerson tendered to him the amount due upon his mortgage, and costs, and demanded that he should receive the same and execute and deliver to him an assignment of the mortgage, or release his lands from the lien thereof, which Welling refused to do.

It is conceded that the land in this State was of less value than the amount due upon the first mortgage, and it is not

questioned that the whole farm, excluding that owned by Ryerson, was of more value than the sum due upon that mortgage.

We are of opinion that Ryerson's demand should have been complied with. After the conveyance by Jeffers of the five acres to Ryerson, according to a well-established rule of equity, he could have required that the balance of the whole farm covered by the prior mortgage should be first sold before resort to his portion thereof. That was an equity which Welling was bound to respect, and which in some way he could be compelled to respect. The fact that the land was situated in two States does not affect the matter.

Welling was proceeding to foreclose his mortgage in disregard of this rule. He had obtained a judgment which authorized a sale of Ryerson's land without any resort to the New Jersey land, and he threatened to execute the judgment in that way. Ryerson's land stood to Welling only as security for the other land, to be resorted to only in case that should prove to be insufficient. Under such circumstances Ryerson's position was such that he had the right to protect himself by claiming an assignment of the mortgage and judgment, so that he could use the same so as to secure his equitable rights. (*Averil v. Taylor*, 8 N. Y. 44; *Cole v. Malcolm*, 66 id. 363; *Twombly v. Cassidy*, 82 id. 155.)

It appears by the record in the case of *Ryerson v. Welling*, that the judgment in this State has been executed by the sale of the land within this State excepting that belonging to Ryerson, and that the New Jersey judgment has also been executed by the sale of the land in that State, and that all the land sold brought more than sufficient to satisfy the first mortgage and all the costs of the foreclosure proceedings and of the sales. Hence that has in fact been accomplished which equity requires, and Ryerson is entitled to have his land released and discharged from any liability.

The fact that the deeds to Ryerson, senior, and by him to his son, were not properly acknowledged so as to entitle them to be recorded or read in evidence, is not available to the appellant. In the case of *Welling v. Ryerson* the complaint recog-

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nizes the deed as properly executed and recorded, and the answer alleges that it was duly executed, acknowledged and recorded, and the judgment adjudicates in effect that these deeds were properly acknowledged and recorded, as it gives them effect and priority over the second mortgage of Welling. In the case of *Ryerson v. Welling* the complaint contains averments substantially that the deeds were properly executed, acknowledged and recorded, and those averments are not denied in the answer.

We are, therefore, of opinion that in the one case the order should be affirmed, with costs, and in the other case the judgment should be affirmed, with costs.

All concur.

Order and judgment affirmed.

WILLIAM R. SEWARD et al., Respondents, v. HENRY F. HUNTINGTON, impleaded, etc., Appellant.

Three persons, who had jointly indorsed the notes of a manufacturing corporation, entered into a written agreement with each other to the effect that if the corporation should fail to pay said notes at maturity they would each pay one-third of the amount unpaid, and in case of failure of either to pay his proportion, and either of the others should pay more than his share, the one so paying should "have and recover from the one so failing an amount equal to his aliquot part." It was also agreed that each of the parties should execute, to a trustee named, a mortgage as security for the performance of his agreement; and it was provided that in case of failure of one of the parties to pay his share of the unpaid paper, "and which either of the parties shall have paid in whole or in part, then and in that case the said trustee is empowered, and it shall be his duty, at the request of the parties so having paid, to foreclose the mortgage made by the party" so failing to pay. Mortgages were executed as required; each stated that it was given to secure the payment of \$25,000, according to the conditions of the agreement. The corporation made default in the payment of certain of the notes. In an action brought by the trustee and the holders of certain of said notes to foreclose one of the mortgages, it was shown that the corporation and the indorsers

94	104
118	548
94	104
122	221

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were insolvent, and that nothing had been paid upon said notes by any of the parties. *Held*, that the trust was not created for the benefit of the creditors, but solely for that of the parties to the agreement; that it imposed no primary liability upon the latter; and that the holders of the notes were not entitled to be subrogated to the rights of the indorsers in the securities; also that the action could not be maintained, as there had been no breach of the condition of the agreement, authorizing a foreclosure, as neither of the other parties thereto had paid any portion of the sum which the mortgagor was thereby bound to pay.

Lawrence v. Fox (20 N. Y. 268) and *Burr v. Beers* (24 id. 178), distinguished. Also *held*, that one who had purchased the mortgaged premises upon foreclosure of a junior mortgage, executed by the same mortgagor, the foreclosure suit having been brought prior to the adoption of the last seven chapters of the Code of Civil Procedure, succeeded to the rights of the mortgagor (2 R. S. 192, § 158), and was entitled to come in and defend. *Seward v. Huntington* (26 Hun, 217), reversed.

(Argued October 18, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made December 30, 1881, which affirmed a judgment in favor of plaintiffs, entered upon the decision of the court on trial at Special Term. (Reported below, 26 Hun, 217.)

This action was brought to foreclose a mortgage executed by defendants Jones and wife to the plaintiff Seward, as trustee, etc., given, as stated therein, "as a security for the payment of the sum of \$25,000, according to the terms and conditions expressed in certain articles of agreement and declaration of trust executed by Jarvis Lord, Ezra Jones and Burall Spencer, of even date herewith."

The substance of said agreement as well as the other material facts are stated in the opinion.

The other plaintiffs herein claimed as holders of certain promissory notes executed by the Rochester Iron Company, and indorsed by the parties to said agreement, the payment of which, it was alleged in the complaint, was secured by said mortgage.

Theodore Bacon for appellant. The mortgage and the agreement of even date referred to in it are to be regarded, for

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purposes of construction, as but a single instrument. (*Marsh v. Dodge*, 66 N. Y. 533.) The breach of the provision of the agreement that each of the parties would pay one-third of the notes upon the maker's failure to pay them is no default in the mortgage, as it was not given on such condition. (*Garnsey v. Rogers*, 47 N. Y. 233; *Roe v. Barker*, 83 id. 431, 435; *Root v. Wright*, 84 id. 72.) The creditors of the iron company, who have joined themselves with Mr. Seward as co-plaintiffs, but are not his *cestuis que trustent*, have at least no better rights under these mortgages than the mortgagee, and those for whom he is expressly declared to be a trustee. (*Pratt v. Adams*, 7 Paige, 615, 627.) The indorsers and mortgagors are sureties, and only sureties. Neither their personal liability, nor that of their property is to be extended by construction beyond the precise terms of their contract. (*Wright v. Russell*, 3 Wils. 530; *Myers v. Edge*, 6 Term R. 248; *Walsh v. Bailie*, 10 Johns. 180; *Wright v. Johnson*, 8 Wend. 512; *Dobbin v. Bradley*, 17 id. 422; *Walrath v. Thompson*, 6 Hill, 540; 2 N. Y. 185; *McCluskey v. Cromwell*, 11 id. 593; *Leeds v. Dunn*, 10 id. 469; *Stewart v. Ranney*, 26 How. Pr. 279; *Barns v. Barrow*, 61 N. Y. 39; *Smith v. Starr*, 4 Hun, 123.) Where sureties execute each to the other as security between themselves only mortgages for the payment of the debt, such mortgages are not available to the creditors of the principal upon the principle of subrogation. (*Hampton v. Phipps*, 28 Alb. L. J. 109; *Maure v. Harrison*, 1 Eq. Cas. Abr. 93; *Wright v. Marley*, 11 Vesey, 12; *Hopewell v. B'k of Cumberland*, 10 Leigh, 206.)

James Breck Perkins for respondents. The respective indorsers, being each liable for the whole amount of the debt, to pay which this covenant was made, it created a privity between the holder of the paper and the covenantee. (*Lawrence v. Fox*, 20 N. Y. 268.) A creditor has a right to enforce the securities which the principal debtor has given to any surety for his, the creditor's, benefit. The holders of the indorsed paper have a right to foreclose these mortgages, either in their

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own names, or through the instrumentality of Seward, the trustee. (*Curtis v. Tyler*, 9 Paige, 432; *Bleeker v. Bingham*, 2 id. 246; *Campbell v. Smith*, 71 N. Y. 26-28; *Rogers v. Kelly*, 88 id. 234, 238-9.) Each of the three parties having agreed to pay one-third of the debt for which the others were liable as indorsers of all the paper, and having executed the mortgage to secure that payment, the mortgage, even if running to the indorsers, could be enforced by the holders of the paper. (*Nat. B'k of Seneca v. Bigler*, 83 N. Y. 51, 60, 61; *Curtis v. Tyler*, 9 Paige, 432; *Boyd v. Parker*, 42 Md. 182.)

RUGER, Ch. J. In the application to this case of the principle, that creditors and sureties are mutually entitled to be subrogated to the rights which either possess in any securities contributed by the debtor as an indemnity to such party or for the discharge of such indebtedness, the court below, we think, erred through a misconception of the meaning and object of the agreement out of which the mortgage in suit arose.

The mortgage sought to be foreclosed was executed by Ezra Jones and Catherine D., his wife, to William R. Seward, trustee. The names of the proposed beneficiaries, do not appear in the mortgage, but it was therein stated to have been given to secure the sum of \$25,000, according to the conditions of a certain agreement and declaration of trust therein referred to.

These instruments having been simultaneously executed by the same parties and being mutually referred to, must be considered together as one contract. The declaration of trust is prefaced by the following sentence: "Articles of agreement and declaration of trust, by and between Jarvis Lord, of Pittsfield, Ezra Jones, of Rochester, and Burrell Spencer, of Buffalo." After reciting the fact that the several parties thereto were each interested in the Rochester Iron Company and that they were and would probably continue to be joint indorsers upon its paper, it proceeded: "therefore we have agreed each with the other, and we do agree each with the other," if the said company shall fail to pay at maturity any of said indorsed notes, we will

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each and severally pay one-third of the amount of such notes as the company shall fail to pay. The consequences of the failure of either to perform this agreement to pay were then described as follows: "If any or either of the parties hereto shall fail to pay his or their proportion or aliquot part of said notes, and either of the said parties shall pay more than his aliquot part thereof, *he shall have and recover* from the one so failing, an amount equal to his aliquot part." It was further provided that each of the parties should execute with his wife a mortgage to Wm. R. Seward, as trustee, *as security that each of said parties should keep and perform his agreement.*

The contracting parties then apparently, for greater precaution against a misconception of their intentions, inserted a further provision describing the precise conditions upon which alone the trust created should become operative. They say: "And in case any one of the parties hereto shall fail to pay his aliquot part of any such note or notes of the said company, and which the company shall have failed to pay at maturity, and which either of the parties hereto shall have paid, in whole or in part, *then and in that case* the said trustee is empowered, and it shall be his duty, on the request of the parties so having paid, to foreclose the mortgage so made by the party hereto, and who has so failed to pay his said aliquot part, and to collect thereby, and by the sale of the land so mortgaged, the amount sufficient to pay his aliquot part, and out of the money so collected or realized on such sale, he do pay with costs the aliquot part of the party so failing, and whose property shall be so sold, to the party who shall have so paid, and at whose request the said foreclosure and sale shall have been made." The mortgage in suit was executed under this agreement, and upon proof that the Rochester Iron Company made certain promissory notes which were indorsed by Lord, Jones and Spencer together, with one S. M. Spencer, then outstanding and unpaid, the holders of such notes claimed to enforce this mortgage for their own benefit, to the extent of one-third of the gross amount of such unpaid notes.

It was shown that the Rochester Iron Company, as well as

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each of the indorsers were insolvent, and that nothing had been paid upon the notes by any of the parties liable thereon.

No evidence was given on the trial aside from their indorsements showing any legal or moral obligation on the part of either of the mortgagors to pay the notes, or that they had in any way become primarily liable for their payment, unless such liability was created by the declaration of trust. Upon this proof the plaintiffs were allowed, by the judgment of the Special Term, to recover against the defendant Jones, for one-third of the aggregate amount of notes of the Rochester Iron Company indorsed by Jones, Lord and Spencer, which remained outstanding and unpaid. This judgment was affirmed at General Term, and from its decision this appeal has been taken.

The theory upon which this result was reached in the court below, as derived from the opinion of the learned judge who wrote therein, concisely and fairly stated, was, that one of the objects of the creators of said trust, in the execution of that instrument, was to secure to the creditors of the Rochester Iron Company the payment of their claims, and then upon the assumption that because these indorsers had each, as between themselves, assumed the payment of one-third of their joint liability as indorsers, in case the maker of the notes failed to pay them, that, therefore, they became primarily liable to each other for such payment, and that being primarily liable to each other, they would also become thus liable to the holders of such paper, and, therefore, the securities furnished by them to each other were available under the rule of subrogation for the benefit of such holders, as a fund in the hands of a surety furnished by a debtor.

We cannot agree with them either in the construction which has been thus given to this instrument, or in the consequences which have been claimed to flow from such construction. We do not think that the declaration of trust contemplated any benefit to the holders of these claims, or that the said indorsers thereby became primarily liable for the payment of any part of such notes, either to each other or to the holders of them.

If the effect of the agreement between the parties to it could be so construed as to make them primarily liable to each other

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for any part of the debt in question, it could not be so extended as to create that liability toward parties not named therein or intended to be benefited by its provisions. (*Garnsey v. Rogers*, 47 N. Y. 241; 7 Am. Rep. 440; *Pardee v. Treat*, 82 N. Y. 385; *Root v. Wright*, 84 N. Y. 75; 38 Am. Rep. 495.)

The relation thus created would be a purely conventional one, depending upon no principle of equity applicable to the situation of the parties to support it, and necessarily confined to the terms and conditions imposed by the parties creating it.

The effect ascribed by the court below to this declaration of trust, seems to us to be not only a perversion of its true meaning, but directly opposed to the expressed object and conditions of that instrument.

It can be only by wresting a single sentence in this instrument from its context, and giving it an arbitrary force and meaning, that the semblance of color can be given to the contention of the plaintiffs.

It is argued that the clause wherein the indorsers provide, upon the contingency of the failure of the maker to pay its notes, they will each assume and pay one-third part of the notes so indorsed and remaining unpaid by the maker, imposes a primary liability upon such indorsers to the holders of such notes.

It seems perfectly clear that this clause, even considered by itself, by recognizing the primary liability of the maker repudiates such liability as to themselves, but taken in connection with the other provisions of the instruments, amounts to a mere declaration of equality among parties, who might be chargeable with the payment of these liabilities, and an inducement to the assumption of the new obligations which they therein provided for each other.

The contract thereby made, taken in its strongest form against the indorsers, was a conditional agreement to pay a part of the debt precisely the same in character with that created by their original indorsements of the notes in question. By giving effect to the rule that all parts of an instrument shall be considered together in determining its meaning, it is difficult to see how this contract can be misconstrued.

It is in terms confined as to the remedies therein provided to the contracting parties, and its whole object and design, as appears from necessary implication, as well as express language, seems to be to secure equality of contribution, as among themselves, in the payment of their joint obligations.

There seems to have been no motive, inducement or consideration for the parties to assume a new conditional liability to the creditors for a third part of a debt which they were each, by virtue of their indorsements, already under the same conditional liability to pay to him in full.

- While the parties undoubtedly had an object in protecting themselves from any greater than a proportional liability upon their indorsements, it does not appear that they were under any obligation, received any benefit, or had any motive for giving increased security to the creditors of the Rochester Iron Company.

These several contracting parties were simply indorsers on the paper of the Rochester Iron Company, and were not, either as between themselves or the creditors of such company, primarily liable for the payment thereof.

The property which was pledged as security for the performance of this agreement was the individual property of the indorsers, and did not in any sense constitute a fund created by a debtor in the hands of either creditor, or surety, devoted to the redemption of his obligations.

This property was specially pledged by each to the other for the purpose of securing to each other the respective deficiencies of the pledgor in making equal contribution to the payment of their joint obligations.

The creditors of the Rochester Iron Company were neither named or referred to in the agreement, and it does not appear that their rights were then at all in the contemplation of its parties.

The express provisions of this agreement require that each and all of the following conditions should occur before any liability whatever should arise upon the mortgage in question :

First. That the Rochester Iron Company should make its

promissory notes, which should be jointly indorsed by the said Lord, Jones and Spencer.

Second. That the said company should fail to pay one or more of such notes at maturity.

Third. That one of the parties to said agreement should pay the whole, or a part of such notes upon the failure of the maker to do so.

Fourth. That the other party should fail to pay an equal share, or to repay to the party so paying his aliquot portion of any payment made by either of the other parties, upon the notes in question.

We fail to see in the evidence in the case any proof of such a performance of the conditions of this agreement as would give a right of action to any party thereon.

It was expressly provided that upon the happening of each and all of the above conditions, and by established rules of construction, impliedly provided that in no other event was the trustee authorized to enforce the security in his hands, and it could then be enforced against the mortgagors only for the purpose of raising a sufficient sum to repay to his co-contractor the mortgagors' aliquot proportion of such sum as the co-contractor had overpaid upon such notes.

There was no event, either expressly or by implication, provided in the agreement upon which any moneys collected upon this mortgage could be diverted from this purpose and paid to any other person, than to one of the co-contractors or his representative.

It follows as a necessary implication from the premises that neither of the parties to the agreement were either as to themselves or any other persons primarily liable for the payment of the notes of the Rochester-Iron Company, but were liable only to each other, and only for such part thereof as their co-contractors should pay in excess of that portion which the respective mortgagors should also pay.

Although they each agreed with the other, in case they jointly became liable to pay any part of such paper, that they would respectively pay one-third part thereof, yet they further

provided, in explicit terms, what should be the sole and only consequence of a failure to perform such promise, and that was that the mortgage should be used to enforce equality between the parties, and used for that purpose alone.

There being no original liability of these parties for the debts in question, it was certainly competent for them, by the contract between themselves, to limit the liability which they were about to assume, in such way and by such language as they saw fit to use. Such a contract cannot be enforced except according to the meaning and intent of the parties making it.

By the judgment of the court below the mortgagor has not only been made liable contrary to the conditions upon which he expressly limited his liability, but is made liable to a person who was impliedly excluded from the benefits of his contract. Not only this, when we consider that neither of his co-contractors have paid any part of such indorsed notes, and that they are also now insolvent, the party whose property may be valuable enough to produce such a result will be forced to pay much more than the express limit fixed by contract upon his liability.

We are, therefore, of opinion that this case is not within the principle laid down in *Lawrence v. Fox* (20 N. Y. 268), and *Burr v. Beers* (24 id. 178), for the reason that the agreement in question was not intended by the parties thereto to operate for the security or benefit of the plaintiffs, who are creditors of the Rochester Iron Company. (*Garnsey v. Rogers supra*; *Pardee v. Treat, supra*; *Root v. Wright, supra*.)

We are also of the opinion that there has been no breach of the conditions of this agreement authorizing an action upon the mortgages given to secure its performance.

We think this case comes directly within the principles decided in the case of *Hampton v. Phipps*, in the Supreme Court of the United States, with a copy of the opinion in which, written by Mr. Justice MATTHEWS, we have been furnished by the appellants. There, as here, the joint sureties upon certain notes had agreed between themselves to become in-

dividually liable for the payment of a specified proportion of the aggregate debt, secured by their joint guaranties; and there, as here, mortgages were respectively executed by these sureties to secure the performance of their agreement. The learned judge after stating the respective rights of the creditor and surety, to be subrogated to, and have the benefit of all or any securities furnished to either by the principal debtor, says: "It follows that the present case cannot be brought within either the terms or the reason of the rule, for as the property in respect to which the creditors assert a lien was not the property of the principal debtor, and has never been expressly pledged to the payment of the debt, so no equitable construction can convert it, by implication, into a security for the creditors." And he further says: "But the conditions of those mortgages have not been broken, and the very fact which is supposed to confer the right upon the creditor to interpose — the insolvency of the sureties — has rendered it impossible for either to fasten upon the other a breach of the condition of his mortgage. As neither can pay his own proportion of the liability which they agreed to divide, neither can claim indemnity against the other for an over-payment."

We are further of the opinion, that the defendant, Henry F. Huntington, has succeeded to the rights and position of the mortgagor, Ezra Jones, through his purchase of the mortgaged property upon the foreclosure and sale thereof under a junior mortgage. This purchase having taken place under a decree made in an action instituted for the purpose of foreclosing such mortgage, previous to the adoption of the last seven chapters of the Code of Civil Procedure, is governed by the provisions of the Revised Statutes relating thereto.

Under a conveyance upon such a foreclosure and sale, the purchaser succeeds not only to the rights of such prior mortgagee, but also to the right of Jones, the owner of the equity of redemption. It is expressly provided by statute that the deed given under such a proceeding shall be as valid as if the same had been executed by the mortgagor and mortgagee, and shall constitute an entire bar against them and all parties to the suit,

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their heirs and all claiming under such heirs. (2 R. S. 192, § 158; *Holden v. Sackett*, 12 Abb. Pr. 474.)

It follows that Huntington was rightfully substituted as defendant in the place of Jones, and is entitled to protect the property purchased by him from the unfounded claim asserted thereto by the plaintiffs in this action, by an appeal from the judgment sustaining such claim.

The judgment of the General and Special Terms should be reversed, and judgment ordered for the defendant.

All concur.

Judgment reversed.

94	115
110	416
94	115
148	489

EDWIN GROAT et al., Respondents, v. WENDELL MOAK, Appellant.

In 1841 the P. C. M. Co. owned lands on both sides of the S. river, also the bed of the river, a dam across it and all the water power created thereby. Upon its lands, on one side of the river, was a cotton factory, on the other side a grist-mill, both run by such water power. In that year said corporation conveyed to C. and M. the grist-mill property, covenanting that the grantee should have and might use the water necessary to operate the grist-mill, "with the exception of the water * * reserved"; by a clause in the deed the grantor reserved to itself "the right at all times to use so much of the water of the river and dam, which now is or may hereafter be therein, or in any dam erected hereafter, as shall be necessary to operate the present or any additional machinery which may be hereafter put in the building now" used as a cotton factory, "or in any building to be erected on the site thereof, of the like or less dimensions." At the time of the conveyance there was in operation, in the factory, machinery requiring one hundred horse power to operate it. The machinery was subsequently changed, and an addition was built to the factory, in which machinery was placed. Plaintiff succeeded to the rights of the P. C. M. Co., but never operated machinery in the mill requiring more than forty horse power; the machinery in the addition required from ten to twenty horse power to run it. In the summer and fall of 1879 the water of the river was low, and with what was reserved and stored in the pond at night, there was not sufficient to operate plaintiff's machinery in the day-time. Defendant, who had succeeded to the rights of C. and M., continued to draw water from the pond to operate his grist-mill. In an action to recover damages and to restrain a further diversion of the water,

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held, that the reference in the reservation to the machinery then in the factory was a measure of quantity not a limitation on the use; that the quantity so reserved could be used for any purpose or anywhere; but beyond that quantity, if power was desired for additional machinery, it could only be used for such as was placed in the original factory building, or one erected on its site; that, therefore, so long as plaintiff did not use more than one hundred horse power, he could use that quantity to propel the machinery either in the main building or the addition, and up to that point, so far as needed to run his machinery, he was entitled to the exclusive use.

The S. river is a public highway; at the place where the dam was erected it was only navigable by row boats. The right to build and maintain a dam, not exceeding eight feet high, was granted by various statutes (Chap. 149, Laws of 1811; chap. 20, Laws of 1835; chap. 531, Laws of 1864) subject, however, to a condition that through it a lock for the passage of boats should be made and kept in repair. A dam was built many years before 1841 and maintained from the time of its construction down, but no lock was ever constructed therein. In 1841 the dam was about nine feet high; in 1879 it was nine feet five inches high and to the top of the flush boards, which were used during the whole summer and fall of that year, the height was ten feet six inches. Defendant claimed the right to draw water from the pond when the water was more than eight feet deep at the dam, and at no time used the water when it could not have run over a dam eight feet. *Held*, that such claim was untenable; that, as against the defendant, plaintiff had the right to maintain the dam at any height, and to hold and store the water required to produce power sufficient to operate his machinery, and to use all the water so stored so far as necessary to produce such power; and whenever there was not sufficient water to give that power, any use of it by defendant was unauthorized and unlawful.

Also *held*, that defendant could not object that the dam, as maintained, was unauthorized and an unlawful obstruction of a highway; that plaintiff, as riparian owner, had the right to dam it, and if he unlawfully obstructed its use as a highway, defendant could only complain as a navigator, and on proof that he desired to use the river for navigation.

Also *held*, that, in the absence of proof that any one can, or does, or desires to navigate the river, the dam could in no sense be considered a nuisance such as calls upon a court of equity to deny plaintiff relief; that defendant, as against him, was estopped from denying his right to the water reserved.

Also *held*, that as the acts limiting the height of the dam were private acts, in the absence of evidence of knowledge, plaintiff was not chargeable with notice of the limitation.

(Argued October 24, 1883; decided November 20, 1883.)

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APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 24, 1882, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee.

A mem. of the decision below appears in 26 Hun, 380.

This action was brought to recover damages for the diversion of water and to restrain the defendant from the further diversion thereof.

The case contained simply the findings of the referee, from which the following facts appear: The Susquehanna river is a public highway under the statutes of this State, and has been so, at least, since 1813. From its source at Otsego lake, for a distance of sixteen miles, it is not navigable except for row boats of a size sufficient to carry three or four persons or their weight in the produce of the country. The right to build and maintain a rolling dam across the river, not exceeding eight feet high, which had been granted by the legislature to Oliver Corey by chapter 149 of the Laws of 1811, was continued to the Phoenix Cotton Manufactory by chapter 20 of the Laws of 1835, and was again continued by chapter 551 of the Laws of 1864, subject to the restrictions and conditions contained in the act, one of which is that a good, sufficient and convenient lock shall be made and kept in repair through the dam for the passage of boats up the river to the lake. At the point mentioned in these acts, about three miles below the outlet of the lake, many years before 1841, a dam was constructed across the river, but, so far as appears, there was never any lock in the same. The dam had been erected and was maintained for the purpose of furnishing water power for a cotton factory located on the east side of the river and a grist-mill located on the west side. The cotton factory was a stone building ninety-eight feet long and forty-eight feet wide, five stories high and contained machinery for the manufacture of cotton cloth, propelled by water conducted from the east end of the dam. The grist-mill was located at the westerly end of the dam and was operated by water taken from that end of the dam through a flume.

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In August, 1841, the Phoenix Cotton Manufactory being then the owner of the dam and all the water power, and of the lands above and below the dam on both sides of the river, in consideration of the sum of \$2,500 paid to it, granted by warranty deed to Alexander Clark and Jacob Moak a portion of its lands described as follows: "All that certain piece and parcel of land with the grist-mill and messuage thereon, situate, lying and being in the town of Otsego, in the county of Otsego, and bounded and described as follows: Beginning on the west side of the Susquehanna river at high-water mark at a stake and stones; thence north, sixty-five degrees and thirty minutes west, four chains to a stake and stones on the road; thence north, eighteen degrees and thirty-seven minutes east, eight chains and twenty-one links, to Daniel Olendorf's land; thence easterly, on Olendorf's land, to the river at high-water mark, to the place of beginning." That deed contained the following reservation, and was upon the following condition, to-wit: "Provided, nevertheless, and every thing herein contained is upon the express condition that it shall and may be lawful for the said party of the first part, *i. e.*, the Phoenix Cotton Manufactory, and they do hereby expressly reserve to themselves the right at all times to use so much of the water in the river and dam which now is or may hereafter be therein, or in any dam erected hereafter, as shall be necessary to operate the present or any additional machinery which may be hereafter put in the building now used by them for the manufacture of cotton cloth, or in any building to be erected on the site thereof, of the like or less dimensions." The deed also contained the following covenant: "And the said party of the first part do hereby covenant and agree that if the said parties of the second part, their heirs and assigns, shall and do at all times hereafter well and sufficiently keep in repair and maintain a good and sufficient flume to the grist-mill above granted, in its connection with the dam, so that no water be unnecessarily or unavoidably wasted, the said party of the first part will in like manner sufficiently keep in repair and maintain the said dam,

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and the flumes and dykes connected therewith, used or to be used by them, and that the said parties of the second part shall have and may use, with the exception of the water above reserved for operating the machinery in the manufactory buildings aforesaid, the use of so much water as shall remain and be necessary for the use of said grist-mill in the operation of its present or any additional machinery to be put in said mill."

In 1867 the machinery in the factory was changed and machinery put therein for the manufacture of woolen cloth, and a different water-wheel was also put therein. The owner also at the same time built a permanent addition or wing, attached to the west side of the factory, one story high, eighty-nine feet long by twenty-four wide, in which was placed a boiler, and in 1870 the same owner again changed the machinery and converted the factory into a building for the manufacture of woolen knit goods, and placed some of the machinery in the wing built and annexed as above stated. The plaintiffs have succeeded to all the rights of the Phoenix Cotton Manufactory, and the defendant to all the rights of Clark and Moak.

At the time of the grant to Clark and Moak, there were in operation in the factory eighty looms with the necessary additional machinery for the manufacture of cotton cloth, using three thousand three hundred and sixty spindles, requiring about one hundred horse power to operate such machinery, leaving considerable unoccupied space on each floor of the building, in which additional machinery might have been placed and operated. The factory then had sufficient capacity for one hundred and sixty-eight looms, and for the necessary machinery to operate six thousand spindles requiring one hundred and twenty horse power. The plaintiffs never operated more than four sets of machinery in the factory, requiring not to exceed forty horse power to propel the same, and the main factory building had sufficient capacity for eight sets of machinery, requiring about seventy-five horse power. The water in the river, from its source to the factory, during the dry season of

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the year, in August and September, and sometimes later, is very low, and unless the water is reserved and stored in the dam or pond during the night-time and on such days as the factory is not running, there is not water enough in the river, during such dry times, to operate the machinery of the factory. During such times of low water, all the water in the river and dam, including the water so reserved and stored, has been used and is necessary at all times to operate the machinery in the factory. But in ordinary seasons, except in times of low water, there is water enough in the river to run both the factory and the grist-mill. It has always been customary during the times of low water to use flush-boards upon the dam, and during the year 1879, the height of the dam to the top of the roll-beam was nine feet and five inches, and to the top of the flush-boards ten feet and six inches; the flush-boards were used during the whole summer and fall of 1879, and during the time of the several acts complained of in the complaint. During that year, the plaintiffs had, and used in the wing, besides the machinery in the original factory building, certain machinery, requiring for its operation from ten to twenty horse power. But it requires no more power to operate the mill and its machinery with such machinery in the wing, in the manner the same is placed and used, than if all the machinery was placed and operated in the main building. During said summer and fall the water in the river was unusually low, so that, although the grist-mill was not operated during the day-time, the volume of water needed to run plaintiff's factory was greater than the volume of water coming down the river, and the factory, commencing in the morning with the dam full of water, would draw the same down during the day, and on some days, to a line nearly two feet below the top of the flush-boards on the dam, and when drawn down below that point it was impossible to operate any of the factory machinery. When the factory stopped running at night, or at any other time, the pond would gradually fill up more or less rapidly, depending somewhat upon the amount of water let down through

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a dam above the outlet of the lake; but the dam would generally fill up during the night to the top of the flush-boards so that the water would flow over the dam. The running-time of the factory was usually from six and a half o'clock in the morning to the same time in the evening. During the month of August, 1879, although commencing with the dam full in the morning, and the grist-mill not running, the factory could run at full speed but a small portion of the day, and the balance of the day could only run a part of the machinery. The machinery in the factory cannot be operated to advantage, unless the water in the dam is at the top of the flush-boards, and cannot run at all when it is two feet below the top of the flush-boards. The dam, and flumes, and dykes connected therewith, were sufficiently kept in repair and maintained. At divers times during the summer and fall of 1879 the defendant drew down the water in the river and dam for his grist-mill so that the plaintiffs could not successfully operate the machinery in their factory, and this he did when all the water in the river and dam was necessary to furnish the requisite power to operate said machinery. But he at no time operated his mill, or used the water from the dam, when the surface of the water in the pond was below the top of the roll-beam, and when the water could not have run over a dam more than eight feet high.

Before and at the time of the commencement of this action the defendant claimed the right to draw water from the pond to operate his grist-mill whenever the water was at the top of, and would run over the roll-beam of the dam, and threatened that he would continue to draw the water when it was at such height. The drawing of the water from the dam by the defendant at the times complained of, caused damage to the plaintiffs to the amount of \$250.

The referee decided as matter of law that the plaintiffs as against the defendant have the right to maintain the dam at any height that may be required to produce sufficient power to run the machinery in their factory, and that they have the

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right to use all the water in the river and dam when it is necessary to produce power to propel such machinery, and that any use thereof, or any interference therewith by the defendant, when there is not sufficient water to give to the plaintiffs the quantity required to operate their machinery, is unauthorized and unlawful, and should be restrained, and he ordered judgment in favor of the plaintiffs for their damages.

Nathaniel C. Moak for appellant. In construing the exception or reservation we must take into consideration the situation of the parties, the state of the country and of the thing granted, at the time of the grant, to ascertain the intention of the parties. (26 Hun, 381; *Griswold v. Hodgman*, 4 T. & C. 328-9; *Swick v. Sears*, 1 Hill, 17; *Norton v. Coons*, 6 N. Y. 33; *Commercial B'k v. Norton*, 1 Hill, 501; *Bishop on Cont.*, § 568; *State v. Allis*, 18 Ark. 269, 276; *Clark v. Rinney*, 7 Cow. 686; *Rogers v. Allen*, 47 N. H. 529; *Many v. Beekman Iron Co.*, 9 Paige, 189, 195; *People v. Globe Mut., etc.*, 91 N. Y. 179; *Rogers v. Bancroft*, 20 Vt. 250, 258-9; *Davis v. Wilson*, 6 Cush. 203; *Miller v. Lampham*, 44 Vt. 435-6; *Adams v. Warner*, 26 id. 395; *Taylor v. St. Stephens*, 6 Ch. Div. 264; 22 Eng. Rep. 796; *Lampman v. Milks*, 21 N. Y. 505, 507; *Simmons v. Cloonan*, 47 id. 3, 9; *Curtiss v. Ayrault*, id. 73, 79; *Rogers v. Sensheimer*, 50 id. 646; *Havens v. Klein*, 51 How. 82, 86; *Roberts v. Roberts*, 7 Lans. 55; affirmed, 55 N. Y. 275; *Flint v. Bacon*, 13 Hun, 454; *Hamel v. Griffith*, 49 How. 305; *Adams v. Conover*, 22 Hun, 424; affirmed, 87 N. Y. 422.) The parties to the deed must be presumed to have contracted with reference to the dam at the height it existed at the time of the deed, there being nothing in the deed itself which is inconsistent with such construction. (*Hapgood v. Brown*, 102 Mass. 451, 452, 454; *Johnson v. Jordan*, 2 Metc. 234; *Ashley v. Pease*, 18 Pick. 268; Angell on Water-courses [6th ed.], §§ 96a, 101a, 104; 3 Washburn on Easements, 397; 2 Parsons on Contracts, 303-305; 2 Greenleaf's Ed. Law of New York, 1798, 214;

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1 Kent & Radcliff's Ed. of Rev. Laws, 1802, 601, § 34; 2 Rev. Laws, Van Ness & Woodworth's ed., 1813, 285, 287, 300.) No right by prescription can be gained to continue a public nuisance, or to commit a misdemeanor. (Washburn on Easements [3d ed.], 511; *Crill v. City of Rome*, 47 How. 398; Wood on Nuisances, 722, 743; *Mills v. Hall*, 9 Wend. 316; *People v. Cunningham*, 1 Denio, 536; *Burbank v. Fay*, 65 N. Y. 57, 69; *Holman v. Johnson*, 1 Cowp. 341, 343; Broom's Leg. Maxims, 576; *Woodworth v. Bennett*, 43 N. Y. 273; *Saratoga Co. B'k v. King*, 44 id. 87; *Rolfe v. Delmar*, 7 Rob. 80; 3 Wait's Act. and Def. 198, 199; *Crocker v. Whitney*, 71 N. Y. 161; *Coppell v. Hull*, 7 Wall. 542, 558-9; *Holt v. Green*, 13 Am. Rep. 737, 739; *Rose v. Truak*, 21 Barb. 361; *Tylee v. Yates*, 3 id. 228; *La Farge v. Herter*, 9 N. Y. 243; *Pease v. Walsh*, 49 How. 269; *Clancy v. Onondaga Salt Co.*, 62 Barb. 395, 407; Bishop on Contracts, § 458; 2 Smith's Lead. Cas. [7th ed.] 283, marg. p. 306; *Bell v. Quinn*, 2 Sandf. 146; *Hull v. Ruggles*, 56 N. Y. 424; *Gray v. Hook*, 4 id. 449, 459; *Benton v. Post*, 20 Barb. 397; *Leavitt v. Palmer*, 3 N. Y. 19; *Niver v. Best*, 10 Barb. 369; *Seneca Co. B'k v. Lamb*, 26 id. 595; *Nellis v. Clark*, 20 Wend. 24.) It makes no difference whether the dam actually interfered with the public navigation of the river or not. It was a nuisance *per se*. (*People v. Vanderbilt*, 38 Barb. 282, 287, 291, 293; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Burbank v. Fay*, 65 id. 70, 71; 26 How. 124; *Hart v. Mayor of Albany*, 19 Wend. 571, 584; *People v. Cunningham*, 1 Den. 524; *Morton v. Moore*, 15 Gray, 573.) The legislature has no power to allow plaintiffs to divert the water from defendant's mill, which he is entitled by law to have run there. He could have restrained plaintiffs' diversion thereof. (*Smith v. City of Rochester*, 17 N. Y. Weekly Dig. 298; *Swindon Water-works v. Wilts Canal*, L. R., 7 H. L. 697; 14 Eng. Rep. 86.) A water-course is real property, and the right to have water flow in it is incidental and appurtenant thereto. (*Ditch Co. v. Canal Co.*, 2 Col. 473; *Cary v. Daniels*, 5 Metc. 236; *Gard-*

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ner v. *Newburgh*, 2 Johns. Ch. 162; 7 Am. Dec. 526, 531, notes; *Brooklyn v. McIntosh*, 133 Mass. 215.) A diversion of a water-course by the authority of a riparian proprietor, to enable a company to supply, in part, a village with water, is a legal wrong to another riparian owner, who thereby sustains a perceptible and substantial damage. (*Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162; 7 Am. Dec. 526, 531, note; *Smith v. Rochester*, 17 N. Y. Weekly Dig. 298; *Milhar v. Sharp*, 27 N. Y. 611; *Pettis v. Johnson*, 56 Ind. 139; *DeLaney v. Blizzard*, 7 Hun, 7; *Francis v. Schoellkopf*, 53 N. Y. 152, 154-5.) Even if the reservation is to be construed as a measure of quantity, or, as the referee finds, "a reservation power," it does not confer the right to use the water or the power in any other place than where they contracted to use it. (*Comstock v. Johnson*, 46 N. Y. 615.)

E. M. Harris for respondents. The referee correctly decided that, as against the defendant, plaintiffs had the right to keep up the dam to any height required to obtain the water necessary to run their machinery. (*Ex parte Jennings*, 6 Cow. 518, 527, 543; *People v. Platt*, 17 Johns. 195; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 185; *People v. Gutchess*, 48 Barb. 656; *Canal Com'rs v. Tibbets*, 5 Wend. 423, 448; *Stow v. Child*, 20 id. 149; *Morgan v. King*, 35 N. Y. 454; 3 Kent's Com. 412, 428.) The plaintiffs, being the owners of the bed of the stream and of the water as far as their land extends, had the right to use the land and water in any way not inconsistent with the public easement. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Jackson v. Hathaway*, 15 Johns. 447; Angell on Water-courses, §§ 541, 546; Thompson on Highways, 21, 22, 23.) This being a fresh-water river and not navigable, in fact, all the public have in the stream is a right of way only; the public is the only party that can complain of the height of the dam as an interruption of navigation. (*People v. Gutchess*, 48 Barb. 656; *Fort Plain Bridge Co. v.*

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Smith, 30 N. Y. 44, 63; *Chenango Bridge Co. v. Paige*, 83 id. 178, 185.) Legislative authority was not necessary in this case to authorize the erection of the dam across the river at the *locus in quo*. (*Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 185, 186; *Fort Plain Bridge Co. v. Smith*, 30 id. 44.) It cannot be assumed, on the facts in this case, that the dam in question is a public nuisance; that is a fact to be established by evidence. (*Mayor v. Curtis*, Clark's Ch. 336, 344; *Peckham v. Henderson*, 27 Barb. 207, 210, 211; *People v. Vanderbilt*, 26 N. Y. 287, 293; *People v. Gutschess*, 48 Barb. 656, 666; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44, 63; 2 Rev. Laws of 1813, 287.)

EARL, J. The rights of the parties depend upon the true construction of the reservation contained in the deed of 1841. It is very clear that the grantor in that deed, for the small consideration then paid by the grantees, did not mean to cripple the large and valuable factory by depriving it of any water power it might need to propel its machinery. If the defendant's contention is right, that he can draw water for his mill whenever the water in the pond is so high that it would run over a dam not more than nine feet high, then he can run his mill most of the time, many times when the factory cannot be run, and instead of having a secondary right to the water he will have substantially the primary right. That the parties to the deed intended to effect such a result cannot be presumed. The reservation is very comprehensive. The grantor was to have the use of the water reserved at all times; not only the use of the water in the dam, but in the river as it then was or might thereafter be; not only the water in the dam as it then was, but in any dam that might thereafter be erected; and it was to have not only all the water necessary to operate the machinery then in the factory, but also all the water necessary to operate any additional machinery which might be put in the factory, or in any building to be erected on the same site, of like or less dimensions.

The reservation of water sufficient to operate the machinery

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then in the factory was general. The reference to such machinery was not to limit or define the purpose for which the water could be used, but to measure and limit its quantity. (*Cromwell v. Selden*, 3 N. Y. 253; *Olmsted v. Loomis*, 9 id. 423; *Wakely v. Davidson*, 26 id. 387; *Comstock v. Johnson*, 46 id. 615.) The reservation was of that quantity of water power, and that could be used for any purpose and anywhere. There is nothing in the reservation confining the use of that power to the factory building; but if the grantor desired water for additional machinery, then it could be used only for such additional machinery as it should place in the same building, or in one not larger, to be placed upon the same site. There was not a reservation of power sufficient to operate all the machinery which the factory could contain, but only all the machinery then in the factory, or which might thereafter be placed therein, or in any building not larger, to be erected upon the same site. Therefore, when the grantor used all the power requisite to operate the machinery then in the factory it had no right to use any more power to operate additional machinery not in the factory, although such additional machinery could have been placed in the factory. To come within the terms of the reservation, the additional machinery must be in the factory. The additional machinery was not only to be a measure of power, but also a limitation upon the use of the power. The quantity of water needed for the machinery then in the factory could then be known and measured, but the quantity which might be required for additional machinery could not then be known or measured, and hence there was the limitation as to such machinery. But the grantor made an absolute reservation of a quantity of water sufficient to operate the machinery then in the factory, and that water it could use anywhere. That results from the fact that it owned the water, and reserved it, and no one could control it in the use thereof. It could use a portion of it to operate machinery in the factory, and the rest to operate machinery in some other building, or it could use the whole of it in a building located upon some other site; and so the law was recognized to be in the case of

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Comstock v. Johnson (*supra*). In that case there was a grant of certain real estate, on which stood a carding machine, and clothing works and shops, and of the privilege of drawing from a dam sufficient quantity of water "for the use of said works." It was held that the terms used for granting the water were to be taken as a measure of the quantity, and not a limitation of the use of the water; and Chief Judge CHURCH said that the grantee "had the right to use the water for any machinery and in any place which he was entitled to occupy."

At the time of the execution of the deed to Clark and Moak, in 1841, the machinery in the factory required for its operation one hundred horse power, and hence so long as the plaintiffs did not use more than that quantity in the main building and the wing combined, the defendant had no cause to complain that they used too much. The finding is that the plaintiffs required to operate all their machinery only from fifty to sixty horse power, and hence if all the water in the river was required to produce that power, they were entitled to it as against the defendant.

The defendant claims, however, that the deed of 1841 is to be construed in reference to the circumstances then existing, and that, therefore, the plaintiffs are required to obtain their power from a dam no higher than that then existing. We think otherwise. The reservation was of a definite quantity of water, "at all times," and hence that the plaintiffs could have that water, they had the right to hold and store it until they could take it, and thus produce the power to which they were entitled. There was no limitation as to the height of the dam. The grantor could take the water from that dam or any dam which might thereafter be erected. It was to have water enough to operate its machinery, and if that dam would not furnish it, it could erect another that would. If it had been intended to confine the dam which might thereafter be erected to the same height, a limitation of so much importance would probably have been plainly expressed, as the limitation was in reference to the size of any other factory building which might be erected on the same site. Construing the reservation in the light of all the

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circumstances existing at the time of the grant, to-wit, the quantity of machinery and of water needed for its operation the size, value and importance of the factory as compared with the grist-mill, the fluctuating quantity of water in the river, which was certain to decrease as the country was cleared up, there can be no inference favorable to the contention of the defendant.

The further claim is made on behalf of the defendant that the reservation must be construed in reference to the statute which authorized a dam of only eight feet. It is not certain, however, that the grantees in the deed of 1841 knew any thing about that statute. It was a private statute, and there is no presumption that such statutes are generally known, and courts do not take judicial notice of them. If both parties to the deed did have knowledge of that statute, they also knew that it was practically a dead letter. The dam as then maintained had no lock, and entirely interrupted navigation in the river, and was about nine feet high without flush-boards, which when used made it still higher. So the grantees had no right to suppose that the statute would be conformed to, and that a dam which was already one foot higher than the height mentioned in the statute would not be made still higher to produce the power reserved.

It is also argued by the learned counsel for the defendant that as the dam is a violation of the statute the plaintiffs cannot claim the right to maintain the same, and hence that they can claim no relief from a court of equity. The grantor in the deed of 1841 owned the bed of the river and the lands on both sides of the river above and below the dam. Assuming that the river is technically a public highway, it has long since ceased to be practically navigable. Although it was a public highway, subject to the public easement for navigation, the riparian owner had the right to bridge it, or dam it, or do any other act which the riparian owners upon streams not navigable could do, and to enable him to do so he needed no act of the legislature. (*Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 38 Am. Rep. 407.) If he put in or over the river any thing

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which obstructed its use as a public highway, the public, or any person specially injured in the use or attempted use of the river as a highway, could proceed against him. Here the public do not complain of the dam, and there is no allegation or proof that the defendant desired to use the river for navigation, and if he can complain of it at all it is only as a navigator. If he is injured in any other way or in any other capacity it is *damnum absque injuria*. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.)

But this dam, upon the facts found, is in no sense a real nuisance. There is no finding that any one navigates, or desires to navigate, or can in any proper sense navigate, the river. Under such circumstances the dam is not, in a moral or legal sense, such a nuisance as calls upon a court of equity to deny the plaintiffs relief as against the defendant. He is estopped from denying that, as against him, they have the right to the water which was reserved. He cannot draw for his grist-mill water which was reserved for the factory. Having done so he perpetrated a wrong which made him liable in this action.

The counsel for the defendant discusses some questions of fact in his brief submitted to us, but as the evidence is not before us we are concluded by the findings.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HENRY R. DUNHAM, Appellant, v. JOSEPH CUDLIFF et al.,
Respondents.

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The complaint in an action to foreclose a mortgage alleged that the mortgage, with accompanying bond, was executed and delivered to the mortgagees named, to secure the payment of \$4,000, and that it was duly assigned and transferred to plaintiff; the answer admitted the execution of the securities as alleged, and the due assignment thereof to the plaintiff, but averred that they were made in pursuance of an usurious

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agreement with the plaintiff. The trial court found the usurious agreement substantially as alleged, and that the bond and mortgage was never delivered to, or in the possession of, the mortgagees. *Held*, that in the absence of any waiver of the admission in the pleadings, this last finding was error. (Code of Civil Procedure, § 522.)

The usurious agreement, as alleged and found, was in substance that the mortgagor should execute the bond and mortgage in question to the mortgagees named, who were creditors of his, and another mortgage of \$3,000 to other creditors; which mortgages should be assigned to plaintiff, he paying therefor the sum of \$6,000. It appeared that plaintiff was informed that the mortgagor did owe the mortgagees the sum of \$7,000; that they had agreed to take such security, and would receipt for the amount thereof, and he could purchase the mortgages for the sum specified. The securities were executed, and plaintiff paid, upon assignment thereof to him, the sum agreed, of which sum the mortgagor paid to the mortgagees \$5,000, the mortgagees named in the mortgage in suit receiving \$3,000. The assignment contained a covenant that the full sum of \$4,000 "is secured, owing and unpaid on account of said mortgage." The mortgagor also made a written statement that the mortgage was given to secure the payment of the sum named, that it was due, and that no defense existed. *Held*, that the defense was not sustained; that the bond and mortgage, on delivery to the mortgagees, became valid securities in their hands, and could be sold by them at any price, without imputation of usury.

But, *held*, that if in fact the real debt owing to the mortgagees was less than the sum named in the mortgage, they could not, nor could plaintiff, enforce it for more than the amount of the debt.

(Argued October 24, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made on the 23d day of December, 1881, which affirmed a judgment in favor of defendant Cudlipp, entered upon a decision of the court on trial at Special Term.

The action was commenced November 1, 1878, for the foreclosure of a mortgage. The complaint states that the defendant Cudlipp, for the purpose of securing the payment to Daniel and Elias Herbert of the sum of \$4,000, on the 16th of December, 1875, executed and delivered to them a bond and mortgage conditioned for the payment of that sum in two years thereafter, with interest, and they, by assignment bearing

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the same date, duly assigned and transferred them to the plaintiff.

The obligor and mortgagor, Cudlipp, alone answered. He denied none of the allegations of the complaint, and expressly admitted the execution of the bond and mortgage to D. and E. Herbert, as stated in the complaint, and that they were at the time stated duly assigned to the plaintiff. But continues the answer, "the bond and mortgage were made in pursuance of an usurious agreement between Cudlipp and the plaintiff, by which the defendant was to make the bond and mortgage now in suit and another to Mackey and Mitchell for \$3,000, and that D. and E. Herbert and Mackey and Mitchell should assign their respective mortgages to the plaintiff," who should pay and advance thereon the sum of \$6,000 and no more, deducting and retaining from the face value of the said bonds and mortgages, \$1,000 as a bonus in addition to the interest reserved by the said bonds and mortgages; that in pursuance of this agreement the defendant made and delivered to the said Mackey and Mitchell and the said D. and E. Herbert, the said bonds and mortgages, and at the same time," "they assigned them to the plaintiff," who loaned and advanced thereon the sum agreed upon, viz., \$6,000 and no more; that at the time of making this agreement, he the defendant, was indebted to Mackey and Mitchell and D. and E. Herbert, and agreed to pay them, and did pay to them, out of the \$6,000, the sum of \$5,000, viz.: to Mackey and Mitchell, \$2,000, and to D. and E. Herbert, \$3,000. The answer further states that the bonds and mortgages "were made for the purpose of being discounted in pursuance of this agreement." The trial court found the agreement between the plaintiff and defendant substantially as stated in the answer, and that it was part thereof that the defendant should procure the mortgagees in said instrument to sign and seal assignments of the same to the plaintiff. He also finds (5th) "that the bonds and mortgages were never delivered to, or in possession of, the mortgagees, or either of them," and (6th) that no consideration other than the said sum of \$6,000 was paid by, or in behalf of,

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the plaintiff, or received by defendant Cudlipp or any one, for said bonds and mortgages, or either of them. He held the bond and mortgage in suit usurious, and directed its cancellation. Judgment was entered accordingly.

Further facts appear in the opinion.

C. Bainbridge Smith for appellant. The answers not having put the averments of the complaint in issue, the defendant was not at liberty either to deny the existence of the facts constituting the cause of action, or to prove any state of facts inconsistent with such admission. (Code of Civil Procedure, § 522; *Fleischman v. Stern*, 90 N. Y. 110, 114; *Walrod v. Bennett*, 6 Barb. 144; 7 id. 198.) The findings of fact by the court are in direct conflict with the admissions in the pleadings which are admitted and incontrovertible facts in the case. (*Ballou v. Parsons*, 11 Hun, 662; *Bridge v. Patton*, 5 Sandf. 210.) A party who admits by his pleading that which establishes the plaintiff's right will not be suffered to deny its existence or prove a state of facts inconsistent with that admission. It is not necessary to read the pleadings in evidence to enable a party to avail himself of an admission therein. (46 N. Y. 418; *Paige v. Willet*, 38 id. 28; *Fleischman v. Stern*, 90 id. 110, 114; *Walrod v. Bennett*, 6 Barb. 144; 7 N. Y. 198.) The bonds and mortgages were good and valid securities in the hands of the mortgagees. They could have been enforced by them, and plaintiff had the right to purchase them at any price the mortgagees would take for them. (*Brooks v. Avery*, 4 N. Y. 225, 229; *Crane v. Hendricks*, 4 Wend. 569; *Rapelye v. Anderson*, 4 Hill, 472; *Baylis v. Cockcroft*, 81 N. Y. 363-371.) To avail himself of the defense of usury, it was incumbent upon the defendant to allege in his answer and prove on the trial that the bonds and mortgages had no valid existence at the time plaintiff purchased them. (*Burrill v. Bowen*, 21 How. Pr. 378; *Cutter v. Wright*, 22 N. Y. 472-4; *Thomas v. Murray*, 32 id. 612.) The defense of usury requires strict proof. (*Marvin v. Feeter*, 8 Wend. 534; *Archibald v. Thomas*, 3 Cow. 284; *Cutter v. Wright*, 22 N. Y. 472.)

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Usury is predicated of a loan and not of a purchase. (*Brooks v. Avery*, 4 N. Y. 225, 229; *Sickels v. Flanagan*, 79 id. 224.) The fact that plaintiff offered to prove the delivery of the bonds and mortgages to the mortgagees did not deprive him of the admission in the pleading. (*Potter v. Smith*, 70 N. Y. 299; Code of Civil Procedure, § 522; *The Lady Superior, etc., v. McNamara*, 3 Barb. Ch. 375, 378.) The undisputed facts constituted an estoppel which excluded the defendant from availing himself of the defense of usury, even if the bonds and mortgages had no inception in the hands of the mortgagees. (*Riggs v. Pursell*, 89 N. Y. 608; *Baylis v. Cockcroft*, 81 id. 363, 371; *Ferguson v. Hamilton*, 35 Barb. 427; *Mason v. Anthony*, 3 Keyes, 609; *S. C.*, 3 Abb. Ct. of App. 207; *Bank of Genesee v. Patchen B'k*, 13 N. Y. 316; *Bowe v. Shutt*, 2 Denio, 621-622; *Holmes v. Williams*, 10 Paige, 326; *Cont. B'k v. Nat. B'k*, 50 N. Y. 375.) While the question of estoppel does not appear to be presented to or passed upon by the court below, it arises and may properly be considered in connection with the point upon which the appellant relies, that the findings of the court that the transactions were usurious had no evidence tending to sustain them. (Code of Civil Procedure, § 993.) The fact that the bonds and mortgages were valid securities in the hands of the mortgagees, of whom the plaintiff purchased them, does not entitle the mortgagor in a suit against him to enforce them to reduce the amount of recovery to the sum the plaintiff actually paid for them. (*Brooks v. Avery*, 4 N. Y. 225-229; *Crane v. Hendricks*, 7 Wend. 569; *Rapelye v. Anderson*, 4 Hill, 472; *Astor v. L'Amoreaux*, 8 N. Y. 107; *Edmonston v. McLoud*, 16 id. 543; *Griffin v. Marquardt*, 17 id. 28.)

Richard M. Bruno for respondent. To constitute usury, there must be a loan, an agreement to return the money, an agreement for a greater interest than is allowed by law, and a corrupt intent to take more than the legal rate for the use of the money loaned. (Tyler on Usury, 92.) Where the contract on its face is for legal interest only, then it must be proved

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that there is some corrupt agreement or device or shift to cover usury, and that it was in full contemplation of the parties. (*Condit v. Baldwin*, 21 N. Y. 219; *Lloyd v. Scott*, 4 Peters, 205; *B'k of U. S. v. Wagoner*, 9 Abb. 399; *Fiedler v. Darrin*, 50 N. Y. 437; *Quackenbush v. Sayer*, 62 id. 344; *Robbins v. Dillayer*, 2 Keyes, 506; *Crane v. Hendricks*, 7 Wend. 569, 635; *Rapalye v. Anderson*, 4 Hill, 472; Tyler on Usury, 103, 108, 110; *Murray v. Harding*, 2 Black, 865.) The mortgages had no legal inception or validity without delivery. (*Ahearn v. Godspeed*, 72 N. Y. 108.) There is no transaction whatever by which a man may cover usury. (Cowp. 796.) No mere form will work an estoppel, and if the person inquiring, or his agent in the special transaction, have knowledge of the facts, a statement made for the purpose of affording him a legal protection will not answer. (*Shapley v. Abbott*, 42 N. Y. 443; *Van Sickle v. Palmer*, 2 T. & C. 612; *Baker v. Mut. Union L. Ins. Co.*, 43 N. Y. 283.) A statement that a mortgage is valid is, therefore, no protection to a party to the transaction out of which the defense arose, even though he received the statement and acted upon it, believing that it would afford him protection. (*Eitel v. Bracken*, 6 J. & S. 7; *Shapley v. Abbott*, 42 N. Y. 443.)

DANFORTH, J. We are of opinion that the plaintiff should succeed upon this appeal.

First. The finding of the learned judge at Special Term that the bond and mortgage in suit were never delivered to the mortgagees cannot be sustained. The complaint expressly avers the delivery of the bond and mortgage to the mortgagees named therein, and the answer admits it. It was a fact in the case, therefore, and for all the purposes of the action to be taken as true. (Code of Civ. Proc., § 522; *Fleischmann v. Stern*, 90 N. Y. 111; *White v. Smith*, 46 id. 418.) If the case had been tried upon the merits, without reference to the pleadings, the objection would not avail the plaintiff (*Cowing v. Altman*, 79 N. Y. 167), but it was not. There was no waiver of the advantage afforded by the pleadings; on the

contrary, the case was tried upon the assumption that the plaintiff's side was established by the pleadings. He was not called upon for proof, and the defendant at once took the affirmative. In view of the pleadings and the provision of the Code (*supra*), the finding as to the delivery of the mortgage should have been the other way. This error alone would require a reversal of the judgment.

Second. With this fact in the case no usury is established. No doubt the plaintiff wanted to get more for his money than simple interest. But he knew the statute of usury, and did not intend to come within it. This was understood by the defendant. No doubt, also, there was then suggested a plan whereby he might keep outside of the statute and still obtain a return from the investment greater than the rate allowed by it. There is no law against that. The defendant suggested the plan. He says, "I immediately told him that I owed money to Messrs. Mackey and Herbert for the building of" certain "houses, and the mortgage could be arranged in that way," that is, he says, "by making a mortgage for \$7,000, that he afterward might have in two, one for \$4,000 and the other for \$3,000, and he receive \$1,000 out of it." This evidence is not very coherent, but he adds, "He," the plaintiff, "to cash them and receive \$1,000," and from this and other evidence not contradicted, it appears that the defendant did then in fact owe these persons and wished to pay them; that the plaintiff was so informed, and also that the debt was \$7,000, and that the creditors would take security by mortgage for that sum, and receipt to the defendant for it, and he, the plaintiff, could purchase the mortgages from them for \$6,000.

After that the defendant employed an attorney to draw the mortgages, stated to him the amounts to be inserted, and the names of the mortgagees to whom, as he also told him, he owed the money. He afterward signed the mortgages, and, as the pleadings admit, they were delivered to the mortgagees, to secure the money due them. From that moment the mortgage in suit had a valid inception, and might be enforced by the mortgagee or sold at any price without imputation of

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usury. It was purchased by the plaintiff, and \$6,000, the stipulated price for both went to the mortgagees. In the case in hand it was paid directly to them by the plaintiff. This was the transaction substantially stated in the pleadings, and the proof upon the trial did not differ from it.

The respondent argues that there was no delivery of the mortgage, but that, as we have seen, is overcome by the admission in the pleadings, and whether the mortgagees took the instruments away from the place where the business was transacted, or immediately handed them over to the plaintiff, is of no moment. There is also in evidence the assignments of the several mortgages to the plaintiff. Each, besides the necessary words of transfer, contains a covenant on the assignor's part that the sum named — in this case \$4,000, in the other \$3,000 — “is secured, owing and unpaid on account of said mortgage,” and the case shows that there was also a written statement from the mortgagor, signed by him, and witnessed, to the effect that the mortgage was given to secure the payment of the money named therein; that it was due, and that no defense existed to the same.

It is apparent, then, not only from the admissions in the pleadings, but from uncontradicted evidence that the bond and mortgage in question were valid securities in the hands of the Messrs. Herbert, the mortgagees, for the amount due to them from Cudlipp. That, according to his evidence upon the trial, was \$3,625; according to Herbert, who was also defendant's witness, it was about \$4,000. That the mortgage was executed to them after a previous understanding with the plaintiff that he would purchase it, although at a sum less than its face, cannot make the purchase usurious or convert the contract of purchase into a loan of money. (*Smith v. Cross*, 90 N. Y. 549; *Brooks v. Avery*, 4 id. 225; *Sickles v. Flanagan*, 79 id. 224.)

It would be different if the mortgage had been executed without consideration, for then it would have no vitality until a sale.

In this case the plaintiff had no reason to suppose that the

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amount due from Cudlipp to his two creditors was less than \$7,000, and the assurance contained in the assignment from the Messrs. Herbert agreed with the sum certified to by the defendant as due to them ; but if, in truth, the real debt was less, they could not enforce it for more than its true amount, and the plaintiff can have no better right. (*Trustees of Union College v. Wheeler*, 61 N. Y. 88.) As the case is now presented it would be just to limit the recovery to the amount actually due the Messrs. Herbert at the time of the execution of the bond and mortgage, with interest.

The judgment of the General and Special Terms should, therefore, be reversed, and, although upon the pleadings and admitted facts in the case the defense cannot prevail, a new trial must be had to ascertain that amount, unless the plaintiff will stipulate that it be adjusted at the sum of \$3,625, and interest from December 16, 1877, in which case he should have judgment of foreclosure and sale in the usual form, according to the prayer of the complaint, with costs in all courts.

All concur, except ANDREWS, J., not voting.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, v.
CHARLES D. J. NOELKE et al., Appellants.

94	137
118	601
118	602
94	137
130	145
94	137
134	116

The word "lottery" indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance.

It is not essential, therefore, in an indictment, under the provisions of the statute (1 R. S. 666, § 29) prohibiting the sale of lottery tickets, to set forth the purpose for which the lottery was set on foot, i. e., that it was for the purpose of setting up for sale, or disposing of any species of property.

It seems that one who purchases a lottery ticket for the purpose of detecting and punishing the vendor, not with intent to aid in the commission of

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the offense, is not an accomplice within the meaning of the provision of the Code of Criminal Procedure (§ 399), declaring that a conviction cannot be had upon the uncorroborated testimony of an accomplice.

Neither the provisions of the Federal Constitution, giving to Congress power to regulate commerce among the States, nor that which forbids the passage of any law impairing the obligation of contracts, prevents a State from passing laws prohibiting the making of contracts within its jurisdiction, which are deemed immoral or against the public policy of the State.

The State, therefore, may prohibit the sale, within its jurisdiction, of tickets in a lottery organized in another State, and which is lawful under the laws of that State; and a sale of such tickets is a violation of said statutory provision.

Ormes v. Dauchy (82 N. Y. 443), *Van Voorhis v. Brintnall* (86 id. 18).

Upon trial of an indictment, charging the violation of said provision, defendant was called as a witness in his own behalf; on cross-examination he was asked whether he had been engaged in the business of lottery tickets, and lottery policies; also whether he had been tried and convicted of violating the law prohibiting the sending of lottery circulars through the mail. These questions were objected to, and objections overruled. *Held* no error.

People v. Crapo (76 N. Y. 288), *People v. Brown* (72 id. 571), *Ryan v. People* (79 id. 594), distinguished.

(Argued October 25, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 27, 1883, which affirmed a judgment of the Court of General Sessions, in and for the city and county of New York, entered upon a verdict convicting defendants of a violation of the statute prohibiting the sale of lottery tickets. (Mem. of decision below, 29 Hun, 461.)

The indictment charged that the defendants unlawfully sold to one Mattocks "a part of a ticket in a certain lottery not expressly authorized by law, commonly called 'The Louisiana State Lottery' * * * which part of a ticket is as follows, that is to say

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\$1. Will draw at New Orleans.	'The Louisiana Lottery Co. Tuesday, April 11th, 1882. The Monthly Two-Dollar Drawing. 'This ticket entitles the holder thereof to one-half of such prize as may be drawn by its number in the within named drawing if presented for payment before the expiration of three months from the date of said drawing.	Incorporated Aug. 17th, 1868.		
Half. Class D. 9849.	M. A. DAUPHIN, . President.			
(Printed across the face.)				
One.	Four.	Eight.	Three.	Six.
1	4	8	3 .	6.' "

Mattocks, who purchased the ticket, was 'the witness for the prosecution to prove the sale. He made the purchase for the purpose of making the proof, and so convicting defendant. It was objected, on the trial, that he was an accomplice, and so that a conviction could not be had under the Code of Criminal Procedure (§ 399) upon his testimony uncorroborated. The court charged the jury that they could not convict on the testimony of the accomplice unless he was corroborated by other evidence tending to connect defendant with the crime charged. Further facts appear in the opinion.

Charles W. Brooke for appellants. The indictment should have stated the object or purpose for which the lottery was made or carried on. (1 R. S. 665, § 27; *People v. Payne*, 3 Denio, 88-90; *People v. Taylor*, id. 94, 95, 101; *People v. Charles*, id. 213; 1 N. Y. 185; *People v. Warner*, 4 Barb. 315, 316; *Comm. v. Manderfield*, 8 Phil. 457; 27 Leg. Int. 86; *Hull v. Ruggles*, 56 N. Y. 427; *Grover v. Morris*, 73 id. 476; Code of Crim. Proc., § 276.) Louisiana lottery tickets are articles of commerce, of value, and the subject-matter of

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contract, valid where issued, and the law which makes the contract, under which they are purchased, void and penalizes the seller, and confiscates all values, dependent upon their drawings which may be brought within its territory, not only impairs the sanctity of contracts, but undertakes to regulate commerce in the same. (Const. U. S., art. 1, § 8, subd. 3; id., art. 1, § 10; 2 Peters, 449; 3 Story's Com., § 1379; *Danks v. Quackenbush*, 1 N. Y. 129; *Ormes v. Dauchy*, 82 id. 443; *Van Voorhis v. Brintnall*, 86 id. 18; *Thorp v. Thorp*, Daily Reg., Jan. 8, 1883.) The fact that a witness has been a convict cannot be shown by his own testimony, even on cross-examination, for the purpose of impeachment. (*Tift v. Moor*, 59 Barb. 626; 1 Greenl. on Ev. 457; *Newcomb v. Griswold*, 24 N. Y. 299-301; *People v. Crapo*, 76 id. 291-292; *People v. Wentz*, 37 id. 309.)

John Vincent for respondent. The statute of Louisiana, authorizing the incorporation of the Louisiana State Lottery Company, was wholly immaterial. Our law declares every lottery unlawful and a common and public nuisance. (1 R. S. 665, § 26.) The Louisiana statute, therefore, could not legalize the act of the defendants in this State. (*Kohn v. Kohler*, 21 Hun, 466; *Wilkinson v. Gill*, 74 N. Y. 63; *Sturtevant v. People*, 23 Wend. 418; *Warner v. People*, 4 Barb. 314; *Charles v. People*, 1 N. Y. 180; *Dana v. Comm.*, 2 Metc. 329; *Terry v. Alcott*, 4 Conn. 442.) In order to constitute an accomplice, a party must be aiding and assisting the accused with criminal intent. (*Reg. v. Mullen*, 3 Cox's C. C. 526, 531; *Wright v. State*, 7 Tex. Ct. App. 545; *State v. McKem*, 36 Iowa, 343; *Comm. v. Downing*, 4 Gray, 29; *Campbell v. Comm.*, 84 Penn. St. 187, 197; *St. Charles v. O'Mailey*, 18 Ill. 407, 412; *People v. Farrell*, 30 Cal. 316; *Harrington v. State*, 35 Ala. 236, 242; *People v. Smith*, MSS. Op., Gen. Term N. Y., 1883; affirmed by this court.) The law forbids the sale of lottery tickets, not the purchase. (1 R. S. 666, § 29; *Comm. v. Hilliard*, 22 Pick. 476; *Harrington v. State*, 35 Ala. 236, 242.) It was not necessary that the indictment should describe

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the purpose or object of the lottery, or that it was intended for the purpose of chance, or of obtaining money, goods or valuable things. (*Pickett v. People*, 8 Hun, 83; *People v. Taylor*, 3 Denio, 91, 95, 96; Code of Crim. Proc., §§ 284, 285; *People v. Warner*, 4 Barb. 314; *United States v. Noelke*, 17 Blatchf. 554, Worcester's Dictionary; *Wilkinson v. Gill*, 74 N. Y. 63, 66; *Hull v. Ruggles*, 56 id. 424; *United States v. Olney*, 1 Abb. [U. S.] 275, 283; *Bell v. State*, 5 Sneed [Tenn.], 507; *Dunn v. People*, 40 Ill. 465; *Thomas v. People*, 50 id. 163; *Randle v. State*, 42 Tex. 581; *Haloman v. State*, 2 Tex. Ct. App. 600; *Ralfe v. Delmar*, 7 Robt. 80; *Wooden v. Shotwell*, 3 Zab. [N. J.] 465; *State v. Mumford*, 73 Mo. 647; Bishop on Statutory Crimes, § 952; *State v. Clark*, 33 N. H. 329, 335; Ree's Cyclopaedia.) The court, having charged substantially all that defendants were entitled to, could not be called upon to repeat it. (*People v. Walker*, 88 N. Y. 89.)

FINCH, J. Upon the principal questions in this case the opinion of the General Term is so accurate and full as to make unnecessary any repetition of its reasoning in expressing our concurrence. It holds that the indictment was sufficient because the word "lottery," if it has no technical legal meaning, as this court has said (*Wilkinson v. Gill*, 74 N. Y. 63; 30 Am. Rep. 264), and is to be construed in its popular sense, indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance; and that any possibility of doubt founded upon the use of the word is dispelled by the further allegation which sets out the form of the ticket charged to have been sold, which refers on its face to the "monthly two-dollar drawing," and in terms "entitles the holder thereof to one-half of such prize as may be drawn by its number in the within named drawing, if presented for payment before the expiration of three months from the date of said drawing." (*People v. Warner*, 4 Barb. 314.) It may be added that the Penal Code (§ 323) now defines a "lottery" with all needful accuracy and precision. We have attentively considered the authorities cited by the appellants, and the criticism to which they have subjected

the averments of the indictment, but remain satisfied that it plainly disclosed and sufficiently charged the substance of the offense forbidden by the statute.

The General Term also held that if Mattocks was to be deemed an accomplice, the court gave to the defendants the full benefit of the rule of the Code (Crim. Proc., § 399), that a conviction could not be had upon the uncorroborated evidence of an accomplice, but that Mattocks was not an accomplice, and so discussion upon the rule or the evidence under it was rendered unnecessary. We agree that Mattocks was not an accomplice, since he purchased the ticket to detect and punish a crime, and not with intent to aid in committing one. From the point of view of the prosecution he was a detective; from that of the defendants a spy, or informer; but in no sense a party to the criminal act or intent so as to become an accomplice.

The further contention that because this lottery was lawful under the law of Louisiana, and its tickets issued represented value, and were property, their sale in this State could not be prohibited without violating the provisions of the Federal Constitution, which give to Congress the power to regulate commerce among the several States, and forbid the passage of any law impairing the obligation of a contract, was properly characterized by the General Term as "a very extraordinary proposition." The learned counsel for the appellants cites recent decisions of this court as indicating a drift in the direction of his argument, and founded upon a logic which involves his conclusion. (*Ormes v. Dauchy*, 82 N. Y. 443; 37 Am. Rep. 583; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505.) Neither of these cases furnishes the slightest ground for a construction which would repeal our penal laws against lotteries, or make them absolute nullities. In the first of these cases the precise question was whether the contract sued upon was a violation of our statute. It did not appear that the advertising of lotteries was to be done in this State, or was in fact done in this State, nor that where contracted to be done it was illegal by the law of the locality. And the recovery was sustained for the reason that our statute against lotteries was in

no manner infringed. The second of these cases respected the *status* of the parties to a marriage contract, made in another State and valid where made, but which would have been invalid if made within our jurisdiction. Both cases rested upon the undeniable truth that our law could have no extra-territorial operation, but neither intimated that within our jurisdiction we could not forbid the making of contracts deemed immoral and against our public policy. There is no impairment of a contract obligation by our law against lotteries. We prohibit the making of certain contracts within our boundaries. The statute does not undertake to say what contracts may or may not be made under a foreign law; and no question is here of a contract valid elsewhere, or as to property brought within this State. It does not even appear that the lottery ticket had ever been issued, or acquired any value of its own, or became a valid obligation anywhere, when attempted to be sold within our jurisdiction. We cannot impair what does not exist. We forbid the contract within our borders; we do not tamper with an existing valid obligation. In the present case no valid contract was or could have been made in this State. One never came into existence either as between Mattocks and the defendants, or Mattocks and the lottery, which under our law was valid or effectual. What happened was purely the violation of a criminal statute, and it made no difference that the lottery itself was authorized by the laws of Louisiana. (*People v. Sturdevant*, 23 Wend. 420; *Charles v. People*, 1 N. Y. 184; *Grover v. Morris*, 73 id. 476.) Our statute destroys no vested right of property innocently acquired, and in no manner regulates commerce between the States.

The defendant, Noelke, was examined on his own behalf, and on cross-examination certain questions were asked, which it is urged were erroneously permitted. One of these questions was, whether since prior to 1877 he had been engaged in the business of lottery tickets and lottery policies. Another was, whether he had been tried and convicted in the United States court for violating the law prohibiting the sending of matters through the United States mail with reference to the drawing

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of any lottery. In *People v. Crapo* (76 N. Y. 288; 32 Am. Rep. 302), the prisoner was on trial for burglary and larceny, and having taken the stand as a witness in his own behalf, was asked on cross-examination if he had been arrested on a charge of bigamy. This court held the question inadmissible, and stated the true rule to be that the disparaging questions must either be relevant to the issue, or such as clearly go to impeach the moral character and credibility of the witness. In *People v. Brown* (72 N. Y. 571; 28 Am. Rep. 183), the question asked the party testifying in his own behalf was how many times he had been arrested, and it was held inadmissible. In *Ryan v. People* (79 N. Y. 594), the witnesses were asked if they had been indicted. This court, recognizing the right to put questions to a witness as to specific facts which tend to discredit him or impeach his moral character, held that the fact of an indictment could not produce such result, since it was merely an accusation and innocence was presumed. In *People, ex rel. Phelps, v. Oyer and Term., Co. of N. Y.* (83 N. Y. 460), we said of this class of questions that our control over them was not absolute, and that, as a general rule, the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character; and to the same effect was *People v. Casey* (72 N. Y. 393). The Penal Code provides that "a person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or his cross-examination, upon which he must answer any proper question relevant to that inquiry." (§ 714.) Within these rules both questions put to the defendant in this case were proper. We cannot say that the first was not pertinent to the issue. The evidence of the party on his direct examination is not given, but we can see that if for a period of time covering the alleged illegal sale to Mattocks, the witness was engaged in the lottery business, it would make much more credible the

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testimony of the informer. But at least a fact was inquired about, which was not merely a charge or accusation, but the actual commission of a crime, and an affirmative answer must necessarily have tended to discredit the witness. The second question was admissible for the reason last named, and was within the rule of the Penal Code. Other objections taken by the appellant it is not deemed necessary to discuss.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JAMES H. WHITFORD, Respondent, v. THOMAS LAIDLER et al.,
Appellants.

Where an authorized agent executes a contract under seal, in which he represents himself as agent, and discloses his principal, and by the terms of which he assumes to contract for the principal only, in the absence of any personal promise or covenant on his part, the contract cannot be held to be his contract and he cannot be made liable individually thereon, although it is signed only in his individual name.

Kiersted v. O. & A. R. R. Co. (69 N. Y. 345), *Briggs v. Partridge* (64 id. 357), *Taft v. Brewster* (9 Johns. 334), *Stone v. Wood* (7 Cow. 453), *Guyon v. Lewis* (7 Wend. 26), distinguished.

In an instrument purporting to be a lease, executed by plaintiff as lessor, various persons named, including the defendants, describing themselves as the officers of a corporation named, were designated as "party of the second part," i. e. lessee. The demise was to the parties of the second part, and their successors in office. They, as such officers, covenanted on behalf of "themselves, and their successors in office," to pay the rent specified. The defendants signed and sealed the instrument in their individual names; the corporate seal was not attached. In an action in which defendants were sought to be charged individually for the payment of rent due, it appeared that the contract was recognized and ratified, both, by the corporation and plaintiff, as the contract of the corporation; it took possession of the demised premises, and paid rent upon demand by plaintiff of its treasurer. *Held*, that defendants were not personally liable.

It seems that although because of the absence of the corporate seal the corporation might not have been liable in a technical action of covenant, it was liable in an action of *assumpsit* for use and occupation.

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It seems, also, that, having contracted in the corporate name, neither the plaintiff nor the lessee named could have questioned its corporate character, had the instrument been properly executed.

After plaintiff and defendants had signed, the instrument was, by their mutual consent, left with one K. to procure the signatures of the other officers named therein, who was instructed, after accomplishing this, to deliver the instrument to the town clerk. *Held*, that as the delivery was thus conditioned upon the approval of the remaining officers, evidenced by their signatures, until this was done, the contract was incomplete and unexecuted; and, in the absence of proof of a waiver of the condition by defendants, did not take effect as a valid contract between any of the parties. Also *held*, that it was immaterial that plaintiff did not hear statements made by defendants, at the time of signing, that they would not consider themselves bound unless all of the officers signed, as that was the legal effect of the transaction.

It is competent for the parties to a contract to agree upon the method of its execution and delivery, and, so long as any material stipulation in this respect remains unperformed, the instrument is inoperative as a contract.

Whitford v. Laidler (25 Hun, 136), reversed.

(Argued October 25, 1883; decided November 20, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 20, 1881, which affirmed a judgment of the Otsego County Court in favor of plaintiff. (Reported below, 25 Hun, 136.)

The nature of the action and the material facts are stated in the opinion.

H. Sturges for appellants. It was a condition precedent to the taking effect of the lease that it was to be signed by all those whose names were in the instrument, and who were the officers of the society. It not having been so executed, it is not binding upon those who did sign. (*People v. Bostwick*, 32 N. Y. 445; *Lovett v. Adams*, 3 Wend. 380; *Bronson v. Noyes*, 7 id. 188.) The contract was the contract of the association, and not of the defendants. (*Bellinger et al. v. Bentley*, 1 Hun, 562; *Haight v. Shaler*, 30 Barb. 218; *Stanton v. Camp*, 4 id. 274; *Randall v. Van Vechten*, 19 Johns. 60; *Brockway v. Allen*, 17 Wend. 40; *Hood v. Hallenbeck*, 7 Hun, 362; *Westcott v. Fargo*, 61 N. Y. 542.) Where a sealed instru-

ment is executed by an agent, with authority therefor, and it appears by the whole instrument that it was the intention of the parties to bind the principal; that it should be his deed, and not the deed of the agent, it must be regarded as the deed of the principal, though signed by the agent in his own name. (*Purrington v. Security L. Ins. Co.*, 72 Me. 22; *Simpson v. Garland*, id. 40; *Orphan Asylum v. Waterbury*, 8 Daly, 35.)

James A. Lynes for respondent. The contract was executed by the defendants as individuals, and not as the agents of the society. The addition of the office they were supposed to hold, in the body of the contract, was merely *descriptio personarum*. (*Taft v. Brewster*, 9 Johns. 334; *Buffalo Catholic Institute v. Weiser*, 13 Weekly Dig. 512; *Kiersted v. O. & A. R. R. Co.*, 69 N. Y. 343; 64 id. 357; 7 Cow. 452; 7 Wend. 26.) If there was a conditional execution of the lease or contract the condition was waived by the acts of the defendants in going on and taking possession of the grounds, grading the track, holding fairs for three years, paying the rent for three years under the contract, etc. (*Ireland v. Nichols*, 46 N. Y. 413; *Shearman v. Niagara F. Ins. Co.*, id. 526; *Collins v. Hasbrouck*, 56 id. 157; *Murray v. Harway*, id. 337.)

RUGER, Ch. J. This action was brought to recover compensation for the use of certain lands, during the year 1875, and a judgment was obtained against the defendants upon the theory that they were personally liable, as joint contractors, upon the written instrument produced in evidence by the plaintiff. This judgment was sustained at the General Term, through an omission to regard the distinctions in evidence pertinent respectively to such an action, and one brought against the association of which the defendants were members.

The action must be treated as one brought to charge the defendants, in their individual capacities, with a liability, upon the written instrument in evidence, no process having been served upon the association to which the defendants belonged. That instrument was partially executed by some of the parties

thereto in February, 1872, and purported to be a contract between the plaintiff, as party of the first part, and thirteen individuals therein named (consisting among others of the seven defendants), describing themselves as president, vice-president, secretary, treasurer and directors, and board of managers of the "Garrattsville Agricultural and Farmers' Club," as the party of the second part.

By this writing the plaintiff attempted to demise to the parties of the second part and their successors in office, for a term of three days in each of the ten ensuing years, certain premises for their use as a fair ground, at an annual rental of \$200.

The parties of the second part, as such officers, covenanted, on behalf of "themselves and their successors in office," to pay to the party of the first part the sum of \$200 annually as and for the rent of said premises.

The instrument contained other provisions whereby the party of the first part contracted to do certain things to prepare the premises for the purposes intended, but these provisions being irrelevant to the questions discussed need not be recited.

Leaving out of view for the present the question whether there has ever been a valid execution of this contract, so as to make it binding upon any of the parties thereto, we will examine the theory upon which the individual liability of the defendants is predicated by the plaintiff.

It is claimed because the instrument is under seal and signed by the defendants in their individual names, without the addition of their official title, that they have made themselves personally liable for the performance of the covenant to pay the rent reserved in the lease.

This question, like others arising upon the interpretation of contracts, must be determined by the language of the instrument itself, unless some ambiguity appears upon its face, or unless phrases of doubtful meaning are employed therein requiring explanation, in which case resort may be had to parol evidence and proof of the attendant circumstances to discover the real meaning and intent of the parties. (*Chouteau v. Suydam*,

21 N. Y. 179; *Hinnemann v. Rosenback*, 39 id. 98; *Moore v. Meacham*, 10 id. 207; *Dana v. Fiedler*, 12 id. 40.)

While we are of the opinion that no such ambiguity occurs in this instrument as entitles the parties to resort to extrinsic evidence to explain its meaning, yet if they should do so, it is quite evident, from the plaintiff's own evidence, that he would derive no benefit from such a proceeding. In speaking of this contract he testifies that "the agreement was to be binding on the society and not against them as individuals;" and again, "that the bargain was, I was to receive \$200 for the grounds from the society."

It is, therefore, not at all prejudicial to the interests of the plaintiff that we confine ourselves to the language of the contract in determining its legal effect.

We think that neither upon principle or authority can this instrument be held to be the contract of the individuals who have signed it. No case has been cited, and we have discovered none holding that, in the absence of a personal promise or covenant, one signing a contract, who therein represents himself to be the agent of a disclosed and known principal, and who assumes to contract for such principal only, has been held personally liable upon the covenants contained in such contract. The case of *Kiersted v. O. & A. R. R. Co.* (69 N. Y. 345; 25 Am. Rep. 199), so much relied upon in the prevailing opinion in the court below, was an action by a lessor to recover the rent reserved upon a lease executed by him to one David C. Smith, and although Smith was therein described as the agent of the defendants, he did not purport to contract in their name, and the covenant to pay rent was in terms his individual promise to perform its obligations. It was properly held that the contract was Smith's and not that of his alleged principal. In *Briggs v. Partridge* (64 N. Y. 357; 21 Am. Rep. 617), an alleged principal was sought to be made liable as defendant upon a contract in which neither his name or interest were referred to, and where his relation to the subject-matter was unknown to the plaintiff when the contract was executed. In the several cases of *Taft v. Brewster* (9 Johns. 334), *Stone v. Wood* (7 Cowen, 453), *Guyon*

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v. *Lewis* (7 Wend. 26), it was held that the addition by the respective defendants to their individual names of that of their titles of office, or a statement of their representative characters, did not shield them from liability upon a contract wherein they had assumed to contract individually, or had, by the terms of their agreement, come under a personal obligation to their several promisees. We can see no analogy between these cases and the one under consideration.

Here the defendants with others were described as the officers of the Garrattsville Agricultural and Farmers' Club. They accepted a lease running to them and their successors in office. Under such a lease it is quite evident that the interest of the persons named in it would cease upon the expiration of their official terms, and it would then inure to the use of the society under the administration of such officers as should succeed them. They covenanted to pay the rent only in the name of themselves and their successors in office, using apt and appropriate language to bind the corporation represented by them. Their contract was, not that they would pay, but that the corporation, through its officers, would pay the rent. By the terms of the agreement the individuals signing the lease ceased to be liable for the payment of the rent reserved when they ceased to be officers of the association named; and their contract was simply that their successors in office should, when elected, be substituted for them in the contract.

It is immaterial that the contract is sealed, or that it was signed only in their individual names, if it appears on the face of the instrument that they contracted with reference to corporate business, and that they had authority to make such contract on behalf of the corporation. In that event the signers do not become liable individually. (*Lincoln v. Crandell*, 21 Wend. 101; *Chouteau v. Suydam*, 21 N. Y. 179; *Schaefer v. Henkel*, 75 id. 378; *Randall v. Van Vechten*, 19 Johns. 60; *Brockway v. Allen*, 17 Wend. 40.)

In this case the evidence of ratification of the contract as the contract of the corporation, not only by the plaintiff, but also by the corporation, is abundant. It not only took possession,

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but it continued to occupy the demised premises for four years under this lease, and upon the demand of the plaintiff to its treasurer, paid the rent agreed upon for each of the years 1872, 1873 and 1874, and failed to pay for the year 1875, simply for lack of funds.

Although owing to the absence of a corporate seal from this contract, the association might not have been liable to a technical action of covenant, yet it undoubtedly was liable in an action of *assumpsit*, for the use and occupation of the premises; and the plaintiff was thus furnished the only remedy which he contemplated at the time of making the contract, viz., the liability of a known principal. (*Randall v. Van Vechten*, *supra*.)

No question can arise as to the corporate character of the Garrattsville Agricultural and Farmers' Club. Not only was the plaintiff a member of that body, but he had contracted with it in its corporate capacity, and neither he nor it could have disputed its corporate character, had the contract been properly executed. (*Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo & Allegany R. R. Co. v. Cary*, 26 id. 78.)

It is sufficient for the plaintiff's purpose that it was a corporation *de facto*, exercising the powers and functions of a *de jure* corporation, and assuming to act as such.

It results from these views that the defendants having entered into no personal obligation with the plaintiff, and having contracted in the name of a known principal, who would have been liable upon the contract if it had been properly executed, are not personally liable to the plaintiff thereon.

We are also of the opinion that this contract was not properly executed and delivered, so as to take effect as a valid contract between any of the parties thereto.

It is competent for the parties to a contract to agree upon the method of its execution and delivery, and if any material stipulation relating thereto remains unperformed by them the instrument will not take effect as their contract. The evidence is undisputed, that upon the partial execution of the contract on February 5, 1871, it was, by the mutual consent of the plaintiff and the defendants, left with one Kellogg to pro-

cure the signatures thereto of the other parties named therein, and upon his accomplishing this object he was instructed to deliver the paper to the town clerk. Such was the method of delivery agreed upon by the parties, and that was conditioned upon the approval of the contract by the remaining officers of the Garrattsville Agricultural and Farmers' Club, evidenced by their signatures to the instrument. This was the mode provided by the parties to manifest their assent to the provisions of the contract, and until this condition was performed, the writing was incomplete and unexecuted. (*People v. Bostwick*, 32 N. Y. 445; *Lovett v. Adams*, 3 Wend. 380; *Pawling v. U. S.*, 4 Cranch, 218; *Russell v. Freer*, 56 N. Y. 67.)

It is immaterial that the plaintiff did not hear the statements made by the defendants, at the time of signing, that they would not consider themselves bound unless all of the officers of the association also signed the instrument. The inference to be drawn from the presence of their names in the body of the instrument, and the absence of their signatures therefrom, and the plaintiff's testimony explaining why the instrument was left with Kellogg, in legal effect amounted to the insertion of that condition in the contract. (*Crandall v. Clark*, 7 Barb. 169; *Chouteau v. Suydam*, 21 N. Y. 179; *People v. Bostwick*, *supra*.)

The proper execution of a written instrument, according to the understanding of the parties, and its delivery in a particular manner, when such delivery is provided for, are essential prerequisites to the legal execution of the instrument. (*Brackett v. Barney*, 28 N. Y. 333.)

None of these conditions with reference to the execution of this contract, by other parties, or its delivery were complied with, and there is no evidence from which a waiver of the performance of the conditions by the several defendants could be implied.

Even if this were held to be the individual contract of the persons whose names appear therein, and some of them had been shown to have waived compliance with its conditions, it

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would not support this judgment, as it was not competent for either of them to waive such conditions on behalf of his associates. There is no competent evidence however of even such a waiver in the case. (*People v. Bostwick, supra*, 451.)

The conduct of some of the defendants in going upon the leased grounds and participating in the general objects of their association could have no effect upon a contract entered into by them on behalf of their association, except to operate as some evidence tending to show a ratification by the association of the terms of the contract. In no event could such acts affect any others than those performing them; and yet they have been relied upon in establishing a liability against persons who had, prior to their occurrence, ceased to have any connection with the lessee.

For these reasons we think the judgments of the Supreme and County Courts should be reversed, and a new trial ordered, costs to abide event.

All concur.

Judgments reversed.

EMERSON DAY, as Commissioner, etc., Appellant, v. FAYETTE DAY, as Commissioner, etc., Respondent.

The provisions of the Revised Statutes relating to town line roads (1 R. S. 516, §§ 73, 74, 75) do not provide for the maintenance of bridges, and the road districts therein mentioned do not include bridges; they simply refer to ordinary road districts, and were intended to provide only for ordinary highway labor.

A bridge, therefore, upon a town line road which is located partly in each of the towns is not to be considered as wholly within the town to which the road district including it has been allotted under said provisions; but the towns are jointly liable for the expense of maintaining it.

The commissioner of highways of one of the towns so liable may waive the twenty days written notice required to be given by the act providing for the maintenance of such bridges (§ 1, chap. 225, Laws of 1841, as amended by chap. 883, Laws of 1857); and where, upon application of the commissioner of the other town, he absolutely refuses to help rebuild

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the bridge, when it becomes necessary, he thereby waives notice, and the latter may rebuild and then maintain an action against the former to recover half the expense.

(Submitted October 17, 1888 ; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made October 8, 1881, which affirmed a judgment of the County Court of Niagara county in favor of defendant.

This action was brought by the commissioner of highways of the town of Royalton, Niagara county, against the commissioner of highways of the town of Hartland in said county, to recover one-half the expense of rebuilding a bridge.

The material facts are stated in the opinion.

Ransom & Joyce for appellant. When two or more towns are required to build and maintain a bridge, such bridge should be built and maintained at their joint expense, without reference to the town lines or the part located in either. (*Lapham v. Rice*, 55 N. Y. 472, 479 ; Laws of 1841, chap. 225, § 1 ; Laws of 1857, chap. 383, § 1 ; *Corey v. Rice*, 4 Lans. 141 ; 1 R. S. 516, §§ 73, 74, 75.) Under the highway law of this State the division of the highways of a town into road districts and the allotment of the districts have no effect whatever upon the bridges of the town ; and this is also true of the bridges on the town line roads. (1 R. S. 340, § 3 ; Laws of 1865, chap. 522, § 7 ; 1 R. S. 501, § 1 ; id. 504 ; *Bartlet v. Crozier*, 17 Johns. 439, 447, 449, 450 ; Wait's Table of Cases ; Connolly's N. Y. Citations ; 12 N. Y. 57 ; 29 id. 307 ; 44 id. 119 ; 12 How. Pr. 556 ; *Town of Pierpont v. Lovelass*, 4 Hun, 696-699 ; *McFadden v. Kingsbury*, 11 Wend. 667.) Statutory provisions which are not of the essence of the thing to be accomplished, and which are not accompanied by a clause rendering the proceeding void if they are not complied with, are construed as directory merely. (*Rimbart v. Young*, 2 Lans. 354 ; *People v. Supervisors of Ulster*, 34 N. Y. 268, 272 ; *Marchant v. Langworthy*, 6 Hill, 646 ; *People v. Cook*, 14 Barb.

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259, 290; 8 N. Y. 67, 89.) A municipal corporation may waive a forfeiture by a contractor. (*People v. Brennan*, 18 Abb. 100; *People, ex rel. N. Y. & H. R. R. Co., v. Havemeyer*, 3 Hun, 97, 110; *Brooklyn v. Brooklyn City R. R. Co.*, 8 Abb. [N. S.] 356; *Baird v. N. Y.*, 74 N. Y. 382.) A board of supervisors may waive a claim for moneys due their county. (*Supervisors of Chenango v. Birdsall*, 4 Wend. 454; *Supervisors of Orleans v. Bowen*, 4 Lans. 24.) A substantial compliance with the statute in highway cases is sufficient. (*People, ex rel. Elliott, v. Com'rs of H. of Greenbush*, 24 Wend. 367; *People, ex rel. Ludlum, v. Wallace*, 2 Hun, 152.) Waiver is equivalent to notice, and dispenses with its necessity. (*People, ex rel. Martin, v. Albright*, 23 How. Pr. 306.) Highway statutes are to be construed liberally; strict technical exactness is not held to be jurisdictional. (*Harris v. Houck*, 57 Barb. 619, 624.) Remedial statutes are to be liberally construed. (*Hudler v. Golden*, 36 N. Y. 446; *People v. Tompkins*, 64 id. 53; *Harris v. Houck*, 57 Barb. 619.)

Ellsworth & Potter for respondent. The provision of the general statutes relating to joint bridges, and providing for the construction and repair of such a bridge, have no application to a bridge situated like the bridge in question. These statutes are primarily intended to provide for the building and maintenance of bridges between towns divided or bounded by a river or stream where the concurrence of two sets of commissioners was requisite to secure the construction and repair of bridges across such streams. (Laws of 1841, chap. 225; *Jones v. City of Utica*, 16 Hun, 441; 2 R. S. [5th ed.] 400, §§ 97, 98, 99; *Tift v. Alley*, 3 T. & C. 784.)

RAPALLO, J. The main question in this case is whether both of the towns, Royalton and Hartland, are liable to make and maintain the bridge in question, or whether that duty devolved upon the town of Royalton alone.

The bridge is situated partly in each of the two towns. It was built upon the town line which divides them, and which

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runs in an easterly and westerly direction. The stream which it crosses runs northerly and southerly. The northerly half of the bridge is in the town of Hartland, and the southerly half in the town of Royalton, and it connects a public highway which crosses the stream and runs along the town line, one-half of the highway and bridge being situated on each side of the town line.

The duty of maintaining the bridge consequently devolved upon both towns, unless otherwise provided by the statutes on the subject. In the absence of any special statutory provision, each town would be liable to maintain the part of the bridge situated within its territory, or in some other manner to bear its portion of the burden. By 1 R. S. 701, § 1, it is provided that the commissioners of highways of each town shall have the care and supervision of the highways *and bridges* therein. By subdivision 1 of the same section, it is made their duty to give directions for the repairing of the roads *and bridges* within their respective towns, and by subdivision 4 of the same section, they are directed to cause the highways *and the bridges*, which are, or may be erected over streams intersecting highways, to be kept in repair. These general provisions make each town liable for the maintenance of the bridges within its territory, and if a bridge is partly in one town and partly in another, it necessarily follows that both towns are liable for its maintenance, unless there is some statute under which the whole liability is cast upon one of them.

The appellant contends that there is no such statute applicable to the bridge in question. If he is right in that contention the act of 1841 (Chap. 225, § 1), as amended by the act of 1857 (Chap. 383, § 1), applies to the case. The act of 1841 provided as follows: "Whenever any *adjoining* towns shall be liable to make and maintain any bridges over any stream *dividing such towns*, such bridges shall be built and repaired at the equal expense of said towns, without reference to the town lines." This act, it is evident, would have been insufficient to meet the present case, for the reason that it applied only to bridges over *a stream dividing the towns*. With

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the view, apparently, of obviating such a difficulty, and rendering the act applicable to every case where a bridge is situated, in part, in two or more towns, without reference to the question whether the stream divides the towns, or the town line intersects or crosses the stream, and divides the bridge longitudinally, as in the present case, the amendment of 1857 was adopted, which provides that "whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of said towns, without reference to town lines." The qualification which made the statute applicable only to bridges over a stream *dividing the towns* was omitted. This amendment was construed in the case of *Lapham v. Rice* (55 N. Y. 472, 479), where it was said: "By this amendment, towns lying on both sides of the stream where a bridge was necessary *upon the lines thereof* were embraced. In short, it was made to include all towns in which any part of the bridge was located."

It was assumed that towns thus situated would be liable to contribute to the building and maintenance of the bridge or bridges of which all enjoyed the benefit. Such a liability would be founded on the plainest principles of justice, and, unless by other statutes some different provision is made, it should be enforced.

The respondent contends, however, that different provision is made for the expense of building and maintaining bridges on town lines, by the statute in relation to town line roads. (1 R. S. 516, §§ 73, 74, 75.) These sections provide, that when a highway is laid out on the line between two towns, it shall be divided into two or more "road districts," in such manner that the labor and expense of "opening, making and keeping in repair" *such highway* through each of said districts may be *equal* as near as may be, and to allot an equal *number* of the said districts to each of said towns, and that each district shall be considered as wholly belonging to the town to which it shall be allotted, "for the purpose of opening and improving *the road*, and for keeping it in repair."

It is to be observed that this statute contemplates that "the

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labor and expense of *opening, working and keeping in repair* the highway in each district shall be, as nearly as possible, the same as the expense for like purposes in every other district. Equality of burden is secured by assigning to each of the towns an *equal number* of such *districts*, and the question now presented is, whether the expense of building and maintaining a bridge is included in the expense of opening, working and keeping in repair *the highway*, as in the seventy-fourth section, or of "opening, improving and keeping in repair the *road*" in the district or districts allotted to each town, as in the seventy-fifth section, for it is for those purposes only that each district is by the seventy-fifth section to be considered as wholly belonging to the town to which it is allotted.

If the expenses here referred to are confined to the opening or grading, working or keeping in repair the road-way, it is reasonably practicable to so divide the highway into districts as to make the expenses for those purposes in the several districts comparatively uniform. But it is self-evident that, if these expenses are to be deemed to include the cost of building bridges, and maintaining or rebuilding them, it would be quite impracticable to divide the road into districts in such manner that the labor and expense of "*opening, working and keeping in repair the highway*" through each of the districts would be "*equal*." The expenses of "*opening*," and those of "*working and keeping in repair*," are placed upon the same footing, but if bridges are included they would naturally differ. The bridges may be small and comparatively inexpensive, but they may be large and costly. The building of a single bridge might cost more than the expense of opening the whole road-way, and the cost of "*opening*," if it includes the cost of building the bridge, would be much greater than that of maintaining. There is no provision for creating one set of districts for the purpose of "*opening*" the road, and a different set for the purpose of working or keeping it in repair, or for changing the districts when a bridge has to be rebuilt. The statute contemplates that the districts, when established, shall be established both for opening and maintaining, and it seems to me that the

frame of the act shows that the districts referred to are simply ordinary road districts, upon which the usual highway labor has to be performed, and that the expense of such highway labor is all that the statute intended to provide for, and that this does not include the building or maintaining of bridges.

The language of the seventy-fifth section harmonizes with this view. It declares that each district shall be considered as wholly belonging to the town to which it shall be allotted, "for the purpose of opening and improving *the road*, and for keeping *it* in repair." This language does not in terms include bridges, and although in a broad sense a bridge may be part of a highway, yet when the whole context of the act is considered, in connection with the general course of legislation on the subjects of highways, road districts, and bridges, and the judicial construction which has been put upon it, it very clearly appears that roads and road districts are considered as distinct subjects from bridges, and that when bridges are intended to be included, they are specifically mentioned. This question is fully discussed by Chancellor KENT in the case of *Bartlett v. Crozier* (17 Johns. 439), in the Court of Errors, and in an opinion concurred in by the whole court, he demonstrates that statutes merely providing for the creation of road districts, and the performance of highway labor thereon, do not apply to bridges. It is made the duty of the commissioners of highways of each town to divide their respective towns into road districts, and it is the duty of the overseers of highways to repair and keep in order the highways within the several districts for which they shall have been elected. (1 R. S. 502, § 1; 503, § 6.) But the case cited decides that this duty does not include that of repairing bridges.

My conclusion is, that the act relating to town line roads does not provide for the maintenance of bridges, and that the road districts therein mentioned do not include bridges, but that bridges are to be dealt with under the other statutes referred to. No other act being referred to which provides for the maintenance of bridges, parts of which are located in two or more towns, the towns are liable, under the act of 1857, for

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the expense of maintaining them, and for that purpose they are not to be considered as wholly within the town to which the road district has been allotted under the Town Line Road Act.

The further point is taken by the respondent that the plaintiff is not entitled to recover in this action because he did not prove the twenty days notice in writing, provided for by the third section of the act of 1841, as amended by chapter 383 of the Laws of 1857. This objection is we think obviated by the findings of fact by the County Court that personal application was made by the commissioner of highways of the town of Royalton to the commissioner of highways of the town of Hartland, and that the latter absolutely refused to help rebuild the bridge, and waived the notice required by the statute.

The whole matter having been within the power of the commissioner, he alone being authorized to give the consent, we think that his waiver of twenty days notice requesting such consent was effectual.

The judgments of the County Court and of the Supreme Court at General Term should be reversed and a new trial ordered in the County Court, costs to abide the event.

All concur.

Judgment reversed.

DAVID P. NICHOLS, Treasurer, etc., as Trustee, etc., Respondent, v. SYLVESTER H. MASE, Appellant.

The C. W. R. R. Co., a Connecticut corporation, in pursuance of the laws of that State, to secure certain bonds issued by it, executed to the State treasurer a mortgage, which, by its terms, covered all the railway lands and personal property then or thereafter belonging to said corporation, and all its rights and franchises under its charter. Default having occurred in payment of interest as provided for by the bonds, the corporation formally surrendered its property to plaintiff as such trustee. Defendant, as sheriff, by virtue of an attachment issued in an action brought in this State against said corporation, levied upon certain of its personal property found here. In an action to recover possession thereof,

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Held, that the bonds having been issued by the State comptroller as required by the law of Connecticut, and being valid upon their face, plaintiff was not bound to show that the provisions of law authorizing their issue had been complied with, but the burden was upon defendant to show their invalidity; also that if any of the conditions precedent to taking of possession had not been complied with, these had been waived by the corporation by voluntarily surrendering possession; and that defendant could not insist upon them.

It seems that under the laws of Connecticut witnesses are not necessary to a mortgage executed by a corporation.

Also *held*, in the absence of proof, it could not be assumed that the property in question was acquired by the corporation after the execution of the mortgage.

It seems that if it had been so acquired it was covered by the mortgage.

Also *held*, that the fact that the mortgage was not filed as required by the statutes of this State in reference to chattel mortgages (Chap. 279, Laws of 1883), or recorded as a mortgage of real estate as provided in reference to railroad mortgages (Chap. 779, Laws of 1883), did not affect its validity; that its validity was to be determined by the laws of Connecticut.

Also *held*, in the absence of proof to the contrary, it was to be assumed that the property in question was in Connecticut at the time of the execution of the mortgage, and the mortgage being valid under the laws of that State, it was valid and enforceable here.

Said corporation held a lease of part of the road of another railroad company in this State; this was in the possession of defendant, and was replevied. *Held*, that plaintiff was not entitled to recover the same in this action; that a lease of itself was not the subject of replevin.

(Argued October 24, 1883; decided November 27, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Mem. of decision below, 25 Hun, 640.)

The nature of the action and the material facts are stated in the opinion.

Homer A. Nelson for appellant. The mortgage executed by the Connecticut Western Railroad Company was void when executed and delivered, because it was not executed as by law required. (§§ 510 and 511, "An act concerning communities and corporations;" Laws of Connecticut, § 5.) The mortgage is void as to property acquired after the execution of the mortgage, and after the act approved Febru-

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ary 28, 1877. (*Gardner v. McEwen*, 19 N. Y. 123; *Hoyle v. P. & M. R. R. Co.*, 54 id. 314; *Edgell v. Hart*, 9 id. 213; *Beardsley v. Ontario B'k*, 31 Barb. 619.) The exercise of comity in admitting or restraining the application of the laws of another country rests in sound judicial discretion, dictated by the circumstances of the case. (*Edgerly v. Bush*, 81 N. Y. 199.) The lease was real estate, not the subject of replevin, but of ejectment, in case the defendant unlawfully withheld possession of it from the plaintiff. (New Code, §§ 206-267.)

R. F. Wilkinson for respondent. There can be no presumption except in favor of the regularity of the mortgage. (*Lane's Case*, 1 De G., J. & S. 511; *Grady's Case*, id. 492.) The personal property in question, including the lease, was covered by the mortgage. (*Buck v. Seymour*, 46 Conn. 156; *Stevens v. B. C. & N. Y. R. R. Co.*, 45 How. Pr. 104.) A lease of another railroad is included. (1 Jones on Mortgages, 157.) A mortgage valid in Connecticut where the railroad was, and where the parties entered into the mortgage contract, protects the mortgagee in his right to any property covered thereby that may have been brought into, or be in the State of New York. (*Martin v. Hill*, 12 Barb. 631-635; *Etna Ins. Co. v. Aldrich*, 26 N. Y. 96, 97; Story's Conflict of Laws, § 244; 2 Kent's Comm. 458, marg. p.; *Hoyt v. Thompson's Ecr.*, 19 N. Y. 224; *Ackerman v. Cross*, 54 id. 32; *Langworthy v. Little*, 12 Cush. 109; *Jones v. Taylor*, 30 Vt. 42; *Ferguson v. Clifford*, 37 N. H. 86; *Edgerly v. Bush*, 81 N. Y. 199; *Martin v. Hill*, 12 Barb. 631.) The right of the trustee to replevy the property cannot be questioned. The right of defendant to hold the property ceased the moment the trustee became entitled to the possession. (*Hall v. Sampson*, 35 N. Y. 274; *Matteson v. Baucus*, 1 id. 295; *Farrel v. Hildreth*, 38 Barb. 178; *Hall v. Curnley*, 11 N. Y. 505; *Nichols v. Mead*, 2 Lans. 222; *Wescott v. Gunn*, 4 Duer, 108; *Fairbanks v. Bloomfield*, 5 id. 438.) The lease is personal property. (*Despard v. Churchill*, 53 N. Y. 199.)

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MILLER, J. The plaintiff, as treasurer of the State of Connecticut, and as trustee for the holders of certain mortgage bonds of the Connecticut Western Railroad Company, brought this action to recover certain personal property, and a lease in possession of the defendant, as sheriff of the county of Dutchess. He claims possession under a mortgage executed by the railroad company to the treasurer of the State of Connecticut.

The defendant was in possession under an attachment issued from the Supreme Court against the property of the company.

The mortgage executed, by the Connecticut Western Railroad Company to the State treasurer of Connecticut, by its terms covered all the lands, railways, etc., and all the personal property then belonging, or which might thereafter at any time belong, to the company, and all rights and franchises of the company under its charter, and was executed in trust for the benefit of the holders of the bonds of the company referred to in the mortgage. It provided that if the interest remained at any time unpaid for six months after the presentation of the proper coupons, the principal should become due. It also provided that the company should remain in possession until default should be made in the payment of interest, and that in case the interest should remain unpaid for six months the mortgagee might, at the request of the holders of one-third the amount of the bonds, take possession of the railroad and all its property, franchises, etc., and through agents appointed by him, operate the railroad, and receive the income and profits thereof. The sheriff levied upon the property under an execution issued upon a judgment against the company on the 19th day of March, 1880. On the 27th day of April, 1880, the property was formally surrendered to the trustee named in the mortgage, in consequence of a failure to pay the interest due upon the bonds which the mortgage was given to secure. If the mortgage in question was valid within this State, there can be no doubt as to the right of the plaintiff to maintain this action, upon proof of a demand and a refusal to deliver.

The objection urged against the validity of the mortgage, upon the ground that it was not executed in accordance with

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the laws of the State of Connecticut, are without merit. There is no ground for the claim that the bonds were not issued in accordance with the charter, and that they were issued without regard to the amount expended, and the sworn statement of the engineer. There was no proof on the trial that there was any failure in this respect, and the bonds being valid upon their face, the plaintiff was not bound to prove that these provisions of the law were complied with. The burden was upon the defendant, as the case stood, to show the invalidity of the bonds.

The law required the comptroller to issue the bonds in accordance with the provisions of the charter, and in the absence of evidence to the contrary, the presumption is that he performed his duty. The objection that the mortgage was not attested by two witnesses, according to the statute of the State of Connecticut, has no force. Witnesses were not necessary to a mortgage executed by a corporation according to the laws of that State. Section 511 of the statute of Connecticut, entitled "an act concerning communities and corporations," prescribes that mortgages executed by railroad corporations shall be authenticated by deed executed by the president, under the corporate seal. This provision was complied with in the mortgage in question, and the statute cited is controlling, as it embraces a mortgage of this character. The general statute does not impair the effect of this special statute cited, as it is not manifest that such was the intention of the legislature. The signature of the president and the seal of the corporation show a due execution of the mortgage in accordance with the law.

Even if there were defects in the execution of the bonds and the mortgage, we think these were cured by the statutes of Connecticut, relating to that subject, which were introduced in evidence on the trial. As, however, we have arrived at the conclusion that the mortgage was properly authenticated, and the bonds properly issued, as the law required, we do not deem it necessary to consider the effect of the remedial statutes referred to.

It is contended by the appellant's counsel that, assuming the validity of the mortgage under which the plaintiff claims title,

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the plaintiff was not entitled to recover, and it is urged in support of this position, that the treasurer of Connecticut never had possession of the property in suit, and that he was only entitled to possession under the terms of the mortgage, which had not been complied with. This objection has reference to the performance of the conditions precedent, contained in the mortgage, which, it is claimed, only entitled the plaintiff to take possession. We think that the evidence shows such a compliance with the terms of the mortgage in this respect as authorized the treasurer of the State to take possession of the property, but we do not deem it necessary to enter upon an examination of the evidence which established the right to take possession. The conditions in this respect were for the benefit of the railroad company, and it having surrendered the property voluntarily, there was a waiver of the same. The corporation having a clear right thus to waive the conditions referred to, and the defendant being a mere trespasser, he is in no position to insist that the terms of the mortgage have not been fulfilled.

The right to renounce a condition in favor of a party to be benefited by its terms is well settled in law, and the claim of one who is a stranger, and who has no connection with, or right to enforce the same, has no foundation to support it. We think that all the property in question was covered by the mortgage, which by its terms includes the railroad stock and all the personal property used in the operation of the railroad, and the appurtenances thereto. Its language includes the property acquired after the execution of the mortgage. Such, evidently, was the intention of the mortgagor in giving, and the mortgagee in taking, security on the property, and there is no ground for claiming to the contrary. Even if there was, there is no proof that the property in question was acquired subsequent to the execution of the mortgage. As every presumption is in a different direction the burden of proof in this respect is upon the defendant.

The question is also raised that the mortgage, even if valid in the State of Connecticut, was not valid in this State, for the reason that it was not filed or recorded here in accordance with

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the statute applicable to mortgages on personal property. By chapter 279 of Laws of 1833, of this State, mortgages on personal property, when not accompanied by a change of possession, were declared to be absolutely void as against the creditors of the mortgagor, unless the mortgage, or a true copy thereof, was filed as provided by the statute. The act further provided for the filing of the mortgage in the town or city where the mortgagor resided, and if the mortgagor was not a resident, then in the city or town where the property so mortgaged was at the time of the execution of the instrument. By the act of 1868 (Chap. 779), it is declared that it shall not be necessary to file a mortgage upon real and personal property, executed by a railroad company, which has been recorded as a mortgage of real estate. Under these statutes the filing or the recording of the mortgage in question would have been necessary in order to render it valid and effectual if it had been made in this State, but they do not apply, and cannot affect the same, as it was properly executed, and was valid according to the laws of the State of Connecticut. The mortgage was effectual in that State. It was not proved that the mortgaged property was in this State at the time of the execution of the mortgage, and it must be assumed to have been in the State of Connecticut. The validity of the mortgage, therefore, must depend upon the rules of law which are applicable to a transaction of this character. The mortgage being valid in the State of Connecticut, where the property was at the time of the execution, and where the parties entered into the contract, it is a protection to the mortgagee in his right to the property included in it, which may have been brought into the State of New York. (In this State it is held that where a contract in regard to personal property is made in another State, that the law of such State as to its validity and effect is to govern here, and if valid there it is to be considered equally valid, and can be enforced here.) (*Etna Ins. Co. v. Aldrich*, 26 N. Y. 96.) So, also, where a lien is valid in this State, and the property is temporarily removed to another State, a creditor cannot defeat the interest acquired under the same, by proceedings *in invitum* in another State. (*Martin v.*

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Hill, 12 Barb. 631.) The rule last stated, is also recognized by the decisions in other States. (See *Langworthy v. Little*, 12 Cush. 109; *Jones v. Taylor*, 30 Vt. 42; *Ferguson v. Clifford*, 37 N. H. 86.) The principle is also well settled that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title wheresoever the property may be situated. (*Hoyt v. Thompson's Exr.*, 19 N. Y. 224.) The true rule is laid down in *Edgerly v. Bush* (81 N. Y. 203), by FOLGER, Ch. J., as follows: "The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him."

It being clear, as we have seen, that the mortgage was valid in Connecticut, under the rule already stated, it was valid in this State, and the plaintiff had an unquestionable right to the property covered by the same. By the rule of comity which prevails between the different States, the right of the plaintiff to the property in question was entitled to protection, and the policy of this State has been to protect the right of ownership, and to leave the buyer to take care that he gets a good title. (See 81 N. Y. 199, *supra*.) The application of this rule rests in sound judicial discretion, dictated by the circumstances of the case, and, in view of the authorities already cited, a proper case was presented for the exercise of such discretion. It cannot be fairly contended that the laws of the State of Connecticut in reference to the rights of the plaintiff are in contravention of the policy and the laws of this State, and that it would be injurious to the citizens of this State to give them effect here. The rule of comity to which we have referred must stand and control in this case, as it is fully established by the decisions of the courts; any other or different rule would not furnish that protection to the interest of citizens of other States which is demanded in their intercourse and business connections with the people of the State of New York.

We think the court erred in allowing the plaintiff to recover the lease of part of the Newburgh, Dutchess and Columbia railroad. The lease, of itself, was not the subject of replevin.

There was also error in directing the jury to assess the value

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of the property taken at \$15,000, as that included the value of the lease in question, and also the undivided one-half interest in land at the junction of the Dutchess and Harlem railroad, in all to the value of \$1,200. In this respect the judgment should be modified by deducting the last-named amount from the damages, and five per cent extra allowance on the same from the costs, otherwise the judgment should be affirmed, without costs of appeal to either party.

All concur.

Judgment accordingly.

KERSEY COATS, as Assignee, etc., Appellant, v. ROBERT W. DONNELL et al., Respondents.

A cashier of a bank has, as incident to his office, implied authority to borrow money for it and, in the absence of any statutory restraint, to secure the loan by pledge of its property or funds; and, as against third persons, the assumption of such authority by the cashier will conclude the bank.

A corporation, in the absence of statutory restrictions, has the right to prefer one creditor to another in the distribution of its property.

The provision of the Revised Statutes (1 R. S. 593, § 9), prohibiting preferences by insolvent corporations, does not apply to foreign corporations.

An oral agreement was made in the city of New York, June 10, 1878, between M., the cashier of the M. Bank, of Kansas City, and the firm of D. L. & Co., the correspondents in New York of said bank, to the effect that if said firm would accept certain drafts, amounting to \$35,000, which had been previously drawn upon it for the accommodation of and negotiated by the bank, the latter would keep on deposit with the firm at all times until maturity of the drafts, a balance equal to the amount thereof, and that the drawees should have a lien on such balance as security, with the right to charge the account at any time with the acceptances, and appropriate to their payment so much of the deposits as should be necessary. D. L. & Co. were advised by the cashier that the bank was embarrassed, but that, with the assistance so obtained and other aid, it would be able to continue business. They accepted the drafts under the agreement, and the proceeds were shortly after deposited with them by the bank, and other deposits were made by it. Sight drafts were subsequently drawn by the bank, on D. L. & Co. in the ordinary course of business, and all presented prior to August 8, 1878, were paid. On July 27 said cashier wrote to D. L. & Co. that he apprehended a run on the

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bank, and directed them to charge up the acceptances; the letter was received July 30, but not then acted upon. On August 3, the firm received a telegram from the cashier, announcing the failure of the bank. At that time the balance of the deposit account in favor of the bank was more than enough to pay the acceptances; these were immediately charged up to the bank. On the same day, but later, the bank made an assignment to plaintiff for the benefit of creditors. D. L. & Co. paid the drafts when they matured. At the time of the assignment there were outstanding unaccepted drafts drawn by the bank on D. L. & Co., amounting to about \$40,000. In an action to recover the sum so appropriated by D. L. & Co. to meet the drafts, *held*, that the agreement was one the cashier had authority to make, both under his general authority, and by virtue of a by-law of the bank which gave him the charge and supervision of the bank, with power to make loans etc.; that the agreement was not invalid as against public policy; and that it, with the subsequent transactions, was effectual to create a lien on the deposit, and authorized the appropriation.

Also *held*, that the agreement was not fraudulent as to the holders of the drafts drawn on D. L. & Co. after it was made.

The accepted drafts were without interest, and at the time of the appropriation their present value was \$34,838. *Held*, that the right of the firm was not limited to this amount; but that they had the right to charge against the account the face of the drafts and hold that amount to meet them when due.

(Argued October 25, 1883; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 24, 1881, which affirmed a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 16 J. & S. 46.)

This action was brought by plaintiff, as assignee of the Mastin Bank of Kansas City, Missouri, to recover an alleged balance to its credit at the time of the assignment of a deposit account with the firm of Donnel, Lawson & Co., of which firm defendants are the individual members.

The material facts are stated in the opinion.

Leslie W. Russell for appellant. An agreement that defendant should have a lien upon the floating balances would be against public policy, and beyond the power of the cashier to

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make. (Laws of Missouri, Myers' Supplement to Wagner's Missouri Statutes, 394, chap. 122, § 21; 1 Wagner's Statutes, ed. of 1870, 280, § 2; *O'Shea v. Collier W. L. Co.*, 42 Mo. 397.) The arrangement between Lawson and Mastin was to be construed in the sense, and with the reservations understood by the parties. (*Barlow v. Scott*, 24 N. Y. 40.) The creation of a lien requires a subject *in esse* in the power of the grantor at the time the lien is created. (*Edgell v. Hart*, 5 Seld. 217; *Bank v. Hunt*, 11 Wall. 391; *Mittnacht v. Kelley*, 3 Abb. App. Dec. 301; *In re Aldrich*, 6 Benedict, 483; *Powers v. Freeman*, 2 Lans. 127; *Otis v. Sill*, 8 Barb. 102; *Smith v. Cooper*, 27 Hun, 565.) Even if the bank had the power to make such an agreement, the cashier certainly could not do it of his own volition. (*Hoyt v. Thompson*, 1 Seld. 320; *B'k of U. S. v. Dunn*, 6 Peters, 51; 1 Daniel on Neg. Inst. 322; *Elliot v. Abbott*, 12 N. H. 549; *Davies Co. Assn. v. Saylor*, 63 Mo. 24; 1 R. S. 591, § 5.) Parties negotiating an illegal contract are estopped from setting up the want of power to make such a contract. (*Delafield v. State*, 26 Wend. 192, 221; *Pratt v. Euton*, 79 N. Y. 449; 25 Hun, 295; *Crocker v. Whitney*, 71 N. Y. 161; *B'k of Salina v. Alword*, 31 id. 473.) The assignee, as trustee for creditors, including those for whom the fund of Donnell, Lawson & Co. was designed, has an equitable standing, which the bank would not have. (*Southard v. Benner*, 72 N. Y. 424, 427; Laws of 1858, chap. 314.) The laws of New York govern this transaction, except so far as by comity the courts recognize the decisions and statutes of Missouri. (*Edgerly v. Bush*, 81 N. Y. 199; *Faulkner v. Hart*, 82 id. 413; *Southern L. Ins. Co. v. Packer*, 17 id. 51, 53; *Curtis v. Leavitt*, 15 id. 9.) The letter of Mastin of July 25, or 27, which is unfortunately lost, did not confer the power to appropriate the general balance to the payment of the time drafts. (1 R. S. 591, § 9 [6th ed.]; 2 id. 298; *Huxton v. Bishop*, 3 Wend. 13; *Robinson v. B'k of Attica*, 21 N. Y. 406; *Furniss v. Sherwood*, 3 Sandf. 521, 523; *Horcy v. Kerr*, 8 Bosw. 194.) The doctrine of set-off cannot be invoked as a defense or counter-claim. (2 R. S. [Edm.

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ed.] 365, § 18; Code of Civil Proc., § 502; *Beckwith v. Union B'k*, 9 N. Y. 211.) Defendants having thrown themselves upon the equity side of the court, and having claimed to come within the privilege of equitable rules, allowing the set-off, their equity must be superior within well-defined rules to justify the exceptional case not provided by rules of law. (*Munger v. Alb. City B'k*, 85 N. Y. 580, 588; *Lindsley v. Jackson*, 2 Paige, 581; *Barber v. Spencer*, 11 id. 517; *Smith v. Felton*, 43 N. Y. 419; *Bradley v. Angell*, 3 id. 475; *Meyers v. Davis*, 22 id. 489; *Martin v. Kuntzmüller*, 37 id. 397; *Chance v. Isaacs*, 5 Paige, 592; *Union B'k v. Beckwith*, 9 N. Y. 211; *Keep v. Lord*, 2 Duer, 78.) The obtaining of funds by time drafts was simply a business transaction, which did not make the drafts accommodation drafts within the usual rule, even though the Mastin Bank was primarily liable to pay. (2 Greenleaf on Evidence, § 172; Chitty on Bills, 319, 328; *Bagnall v. Andrews*, 7 Bing. 217; *Farmers' B'k v. Ruthbone*, 26 Vt. 19.) The precise reasoning which gives an equitable right of set-off as against equitable right of draft holders because legally the plaintiff represents simply the bank, and not their peculiar interest, is inconsistent and untenable. (*Westlake v. Bostwick*, 3 J. & S. 261; *Jordan v. N. S. and L. B'k*, 74 N. Y. 467.) The plaintiff has the right of standing in this court by the comity of the courts to recover upon a demand due him as assignee, and the courts of this State will assist him in closing up his trust, and thus protecting the creditors of the bank, among whom are citizens of our own State. (*N. J. Lombard B'k v. Thorpe*, 6 Cow. 46; *Runk v. St. John*, 29 Barb. 585; *Hoyt v. Thompson*, 1 Seld. 341; *Fenton v. Lumberman's B'k*, Clark, 286, marg. p.)

Rastus S. Ransom for respondents. Courts will take judicial notice of the powers and duties of a cashier, or of other bank officers. (26 How. 5, 6, 7.) As cashier, he may borrow money and indorse notes and so bind the bank. (19 N. Y. 156; 41 Barb. 586; 13 N. Y. 309; *Smith v. Felton*, 43 id. 419.) The bank, having had the benefit of the money obtained on the

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acceptances, is thus estopped from objecting to the right of the cashier to make the contract by which it was obtained or received. (31 N. Y. 611; 32 id. 105; 7 id. 224, 227; Dunlap's Paley on Agency, 171, note o.) As between the defendants and the Mastin Bank, the defendants, although acceptors, were in fact sureties, and were entitled to security. (*B'k of Toronto v. Hunter*, 20 How. 292; *Pratt v. Foote*, 9 N. Y. 463; *S. C.*, 10 id. 600, 601.) A lien that a party would not otherwise have may be given by express agreement. (4 N. Y. 498, 501; *Hale v. Omaha Nat. B'k*, 49 id. 626; *McCafferty v. Wooden*, 65 id. 459; *Wisner v. Ocumpaugh*, 71 id. 113; 74 id. 478.) Any property may be pledged or mortgaged, or a lien given on it, to secure a debt not due or upon a contingent liability. (*Reed v. Sands*, 37 Barb. 185; *Bliss v. Cottle*, 32 id. 322; *Griffin v. Marquardt*, 17 N. Y. 28; *Green v. Warwick*, 64 id. 220; *Cram v. Turner*, 67 id. 437; *Cutts v. Guild*, 57 id. 232, 233; *Blydenburgh v. Thayer*, 34 How. 88; *Ely v. McKnight*, 30 id. 97; 2 Parsons on Contracts, 277, 278; *Draper v. Trescott*, 29 Barb. 404; *McMahon v. Allen*, 12 Abb. 277; *Short v. Barry*, 3 Lans. 147; *Craig v. Hyde*, 24 How. 313; *Towle v. Jones*, 19 Abb. 449; 1 Robt. 87; *Heyward v. City of Buffalo*, 14 N. Y. 540; *Mann v. Fairchild*, 2 Keyes, 106; *Bradley v. Aldrich*, 40 N. Y. 504.) A contingent liability is a debt. (18 Wend. 375, 383, 384, 385, 398; 8 Cow. 406, 424.) Defendants, being acceptors, were primarily liable without protest or notice. (*Suydam v. Westfall*, 2 Denio, 209, 212, 216; *B'k of Toronto v. Hunter*, 20 How. 292.) It is not always necessary for a person who is liable to pay money for another, to first pay that money before enforcing payment to him by the person liable. (*Gilbert v. Wyman*, 1 N. Y. 550; *Bancroft v. Winspear*, 44 Barb. 209; *Rector of Trinity Church v. Higgins*, 48 N. Y. 532.) It is not necessary to invoke the doctrine of equitable set-off, as the defense is established by proof of the agreement giving the defendants a lien upon the deposits. (*Smith v. Felton*, 43 N. Y. 419; 41 Barb. 279, 283; 21 N. Y. 499; 37 Barb. 230; 74 N. Y. 473, 474; 59 id. 537, 538; *Bradley v. Angel*, 3 id.

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475; *Myers v. Davis*, 22 id. 489; *Scheiffelin v. Hawkins*, 14 Abb. 116; *Martin v. Kunzmüller*, 37 N. Y. 396; 10 Bosw. 16; *Munger v. Albany C. N. B'k*, 85 N. Y. 580, 585; *Davidson v. Alfaro*, 80 id. 660.) The contract with the defendants was a New York contract, and the security given to them was given in New York, and the New York law governs. (Story on Conflict of Laws, §§ 242, 280; *Dickinson v. Edwards*, 77 N. Y. 458, 573, 575, 576; *Jewell v. Wright*, 30 id. 259; *Everett v. Vendryes*, 19 id. 436; *Bowen v. Newell*, 13 id. 290; *Ruckle v. Eckhart*, 3 id. 132; *Hyde v. Goodnow*, id. 266; 84 id. 367.)

ANDREWS, J. The right of the plaintiff to maintain this action, so far as respects the sum of \$34,833.49 of the deposit standing to the credit of the Mastin Bank of Kansas City, Missouri, on the books of Donnell, Lawson & Co., on the morning of August 3, 1878, depends upon the force and validity of an oral agreement of June 10, 1878, made in the city of New York between John J. Mastin as cashier of the bank, and Donnell, Lawson & Co., taken in connection with the subsequent appropriation by Donnell, Lawson & Co., in execution of that agreement, and with the consent of the cashier, of sufficient of the funds of the Mastin Bank in their hands, to meet their outstanding acceptances. The agreement of June 10, 1878, as found by the referee, was in substance that if Donnell, Lawson & Co. would accept the four accommodation drafts of June 8, 1878, drawn upon them, which drafts had already been negotiated by the bank, but had not yet been presented to the drawees for acceptance, the Mastin Bank would keep on deposit with Donnell, Lawson & Co., in New York, at all times until their maturity, a sum or balance equal to the amount of the drafts, and that the drawees should have a lien thereon as security for their liability upon the acceptances, and should be kept informed of the condition of the bank, and have the right at any time to charge the account with the acceptances, and appropriate or apply the deposit, or so much thereof as might be necessary, to their payment. The cashier

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of the bank represented to Donnell, Lawson & Co. at the interview of June 10, 1878, that the bank was in straits for money, but that with their assistance, through the acceptance of the drafts, and other aid which could be procured, the bank would be able to tide over its embarrassments, and continue its business. Donnell, Lawson & Co. accepted the drafts under the agreement of June 10, 1878. The proceeds were, within a day or two after they were accepted, deposited by the Mastin Bank with Donnell, Lawson & Co., who had for several years been the correspondent of the Mastin Bank in the city of New York, and the bank subsequently and prior to August 3, 1878, made other deposits with the firm. Subsequent to June 10, 1878, sight drafts in favor of customers, in the usual course of business, were drawn from time to time by the Mastin Bank upon Donnell, Lawson & Co., and such drafts as were presented prior to August 3, 1878, were paid by the drawees, and charged to the account of the bank. On the morning of that day the credit to the bank on the books of Donnell, Lawson & Co. was \$50,459.68. The acceptances of Donnell, Lawson & Co. of \$35,000 had not yet matured, and were held by third parties. They did not draw interest, and their value at that time was \$34,833.49. The cashier of the Mastin Bank, on or about the 27th day of July, 1878, wrote to Donnell, Lawson & Co., informing them that he apprehended a run on the bank, and directing them to charge up the acceptances to the bank. This letter was received by Donnell, Lawson & Co. on or about the 30th day of July, but they did not immediately act upon it. On the 3d of August they received a telegram from the cashier, announcing the failure of the bank, and immediately thereafter, on the same day, they charged the acceptances to the Mastin Bank, and subsequently, on their maturity, paid them to the holders.

The bank on the 3d of August, 1878, made a voluntary assignment of its property to the plaintiff for the benefit of its creditors. This assignment, though made on the same day, was executed after Donnell, Lawson & Co. had charged up the acceptances. There were at the time of the assignment out-

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standing unaccepted drafts to the amount of about \$40,000, drawn by the bank upon Donnell, Lawson & Co., which are still unpaid.

The appropriation by Donnell, Lawson & Co. on the 3d of August, 1878, of sufficient of the funds of the Mastin Bank in their hands, for the payment of their immature acceptances, was in precise conformity to the agreement of June 10, 1878, as found by the referee. It is claimed on behalf of the appellant that the agreement found, is inconsistent with the presumed intention of the parties, for the reason that as the drafts were negotiated to provide a fund to be deposited with Donnell, Lawson & Co., against which drafts might be drawn by the Mastin Bank, it could not have been contemplated that the fund so provided should be subject to appropriation by Donnell, Lawson & Co. to the payment of their acceptances, to the prejudice of the holders of drafts, for whose benefit the fund was provided. This claim leaves out of view the important fact that the drafts drawn on Donnell, Lawson & Co. had already been negotiated by the Mastin Bank before the agreement of June 10, 1878, was made, and the urgency of the situation so far as the Mastin Bank was concerned in respect to their acceptance, and also the further fact that so far as appears, it was no part of the arrangement between the Mastin Bank and Donnell, Lawson & Co. on the 10th of June, 1878, that the proceeds of the drafts should be deposited with them to meet subsequent drafts of the bank. The fact that the proceeds were subsequently deposited with the firm, or that the drafts were negotiated by the bank for the very purpose of obtaining funds, to be deposited with Donnell, Lawson & Co., subject to its drafts, does not affect the right of Donnell, Lawson & Co. to enforce the agreement of June 10, 1878, or authorize the interpolation of a term into the contract, inconsistent with the actual agreement.

The main controversy between the parties here turns upon the questions, *first*, whether the cashier of the Mastin Bank had authority to bind the bank by the agreement of June 10, 1878; *second*, whether that agreement, if authorized by the

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bank, was invalid as contrary to public policy, or in its nature was ineffectual to create a lien upon the deposit according to its terms, and to justify the appropriation, even though at the time such appropriation was made, it was expressly authorized by the bank; and *third*, (if the agreement was for any reason invalid or ineffectual) whether the plaintiff, as the assignee of the bank, can repudiate the agreement without paying the drafts, or indemnifying Donnell, Lawson & Co. for the money expended in discharging their liability as acceptors.

There can, we apprehend, be no serious doubt of the proposition that the agreement of June 10, 1878, was one which the cashier of the bank was authorized to make, *first*, as incident to his office of cashier, in the absence of any special authority to enter into the particular transaction, and *second*, by reason of the by-law of the bank defining the authority of the cashier, which declares that "he shall have the immediate charge and supervision of the bank; shall attend to the making of loans, discounts, and other active business transactions of the bank, exercising his own judgment as to all such matters, when not otherwise directed by the finance committee or board of directors." The drafts in question were drawn and negotiated for the purpose of procuring money for the use of the bank and to enable it to carry on its legitimate and usual business. The cashier of a bank is its executive officer, and it is well settled that as incident to his office he has authority, implied from his official designation as cashier, to borrow money for, and to bind the bank for its repayment, and the assumption of such authority by the cashier, will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him upon the basis of its existence. (*Curtis v. Leavitt*, 15 N. Y. 9; *Barnes v. Ontario Bank*, 19 id. 152.) The negotiation of the drafts in this case by the cashier was within his authority. The power to borrow being admitted, the power to secure the loan by pledge of the property or funds of the bank, (in the absence of any statutory restraint,) in the ordinary course of business, would seem to be a necessary inference from the primary power, and this is recog-

nized in the cases to which we have referred. The exigency of the bank when the agreement in question was made, rendered it of the utmost importance to its interests to prevent the protest of the drafts, and the authority of the cashier to make the agreement of June 10, 1878, giving to Donnell, Lawson & Co. a lien upon any deposit in their hands, for their security, if at all doubtful irrespective of the by-law, was ample under the comprehensive grant of authority thereby conferred.

The contention that the agreement of June 10, 1878, was ineffectual to create a lien on the deposit in favor of Donnell, Lawson & Co., is founded upon the alleged rule of the common law that no lien can be created by contract, upon property not *in esse* when the contract is made. But that a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence, and where there are no intervening rights of creditors or third persons, seems to be established by several decisions in this court. (*Hale v. Omaha Natl. Bank*, 49 N. Y. 626; *McCaffrey v. Woodin*, 65 id. 459; 22 Am. Rep. 644; *Wisner v. Ocumpaugh*, 71 N. Y. 113.) It is to be observed that the lien of Donnell, Lawson & Co., was to attach only to funds of the bank in their hands. If the bank did not perform its agreement to keep the deposit good, the only remedy of Donnell, Lawson & Co., would be upon the contract, or in case of payment of the acceptances, upon the implied contract for reimbursement. In this case the bank not only entered into an agreement to give a lien, but subsequently put the fund upon which the lien was to attach, into the possession of the pledgee, and in addition to the original authority, concurrently with, or at about the time of the appropriation, specifically authorized its application to the discharge of Donnell, Lawson & Co.'s liability upon the acceptances. Here was not only the precedent declaration spoken of in some of the cases, but the subsequent act uniting with it to perfect and complete the transaction. The agreement was, we think, effectual between the parties, unless forbidden upon some notion of public policy.

The claim that the transaction was invalid on this ground cannot be maintained. It is said that it constituted an unlawful preference. But the agreement for the lien was concurrent with the obligation assumed by Donnell, Lawson & Co., and was made to secure them against their liability as accommodation acceptors for the bank, assumed on the faith of the agreement. When the fund was appropriated, the appropriation was made in pursuance of the original agreement, as well as by the subsequent express authority of the bank. Moreover, regarding the transaction, disconnected from the equities which surround it, as a simple preference of one creditor of the corporation, we do not understand that such preference is unlawful. The right of a failing debtor to prefer one creditor to another in the distribution of his property, while it has been often regretted, is recognized both in courts of law and equity. (1 Sto. Eq., § 370; 2 Kent's Com. 532; *Wilkes v. Ferris*, 5 Johns. 335; *Murray v. Riggs*, 15 id. 571; *Jacobs v. Remsen*, 36 N. Y. 668.) A corporation possesses in this respect the same right as an individual. It may execute a mortgage, or give a lien which shall operate as a preference, unless restrained by its charter or by statute. (*In re File Co. v. Birmingham Banking Co.*, L. R., 6 Ch. App. 83; *Catlin v. Eagle Bank*, 6 Conn. 233; *Dana v. Bank U. S.*, 5 W. & S. 223; 2 Kent's Com. 315, note; *Angell & Ames on Corp.*, § 187.) The Revised Statutes prohibit preferences by insolvent corporations. (1 R. S. 593, § 9.) But the prohibition applies to domestic and not to foreign corporations, and we have not been referred to any provision of the charter of the Mastin Bank, or any statutory provision of Missouri, which forbids a transaction like the one in question. Neither was the agreement of June 10, 1878, fraudulent as to the holders of drafts on the defendants, issued by the Mastin Bank after that agreement was made. The defendants were under no obligation to accept the drafts to which that agreement related. They incurred the liability of acceptors upon the condition that they should have a lien and a right of appropriation for their indemnity. They did not agree to accept subsequent drafts, nor

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were such drafts taken on the faith of any agreement that they should be paid out of the deposit with Donnell, Lawson & Co. The lien claimed by Donnell, Lawson & Co. attached only to funds in their actual possession, and was not subject to the objection which lies to secret liens attempted to be given or enforced upon property in possession of the general owner. The equity of the defendants is superior to that of the other creditors of the bank, and we see no reason for setting aside the arrangement between Donnell, Lawson & Co. and the bank, for the benefit of general creditors.

The point that the plaintiff was entitled to recover the difference between the present value of the drafts on the 3d of August, 1878, and their nominal amount, is not we think well taken. They had a right, under the agreement made, to charge against the account of the bank the face of the drafts, and to hold that amount to meet the sum which they would be bound to pay at their maturity. The question as to the part of the deposit which exceeded the sum claimed in the complaint, was properly disposed of by the General Term.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE, ex rel. MARTIN FRELIGH, Appellant, v. GEORGE W. MATSELL et al., as Trustees, etc., Respondents.

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Where under the provision of the act of 1871 in reference to "the police life insurance fund" (Chap. 126, Laws of 1871) the commissioners of police of the city of New York have, as the board of trustees of that fund, granted a pension to a retired officer of the police force, the beneficiary does not thereby acquire a vested right to the pension, but the board has by the act (§ 5) authority in its discretion to discontinue the same.

(Submitted October 26, 1883; decided November 27, 1883.)

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APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 7, 1879, which affirmed an order of Special Term, denying an application for a writ of *mandamus* herein, directed to defendants as commissioners of police of the city of New York, and as such constituting the board of trustees of "the police life insurance fund," requiring said board to rescind a resolution discontinuing a pension granted to the relator, and to restore him to the roll.

The relator, on and prior to February 8, 1873, was surgeon of police; on that day, by a resolution of said board, he was dismissed from the force and retired on a pension. On the 29th day of June, 1875, the said board passed a resolution discontinuing the pension and he was dropped from the rolls.

W. Fullerton for appellant. *Mandamus* is the proper remedy. (*People, ex rel. Debenetti, v. Clerk of Marine Court*, 3 Abb. Ct. of App. Dec. 491; *People, ex rel. Whitmore, v. Supervisors of N. Y.*, id. 566; 11 Abb. Pr. 114; *People, ex rel. Com'rs, v. Common Council of N. Y.*, 3 Keyes 81; *People, ex rel. Whitmore, v. Bd. of Supervisors of N. Y.*, 2 id. 258; *Buck v. City of Lockport*, 6 Lans. 251; *Healey v. Dudley*, 5 id. 115; *People v. Trustees of Saratoga*, 54 Barb. 480.) The defendants had no lawful power or authority to order the relator's pension to be discontinued, and it is, therefore, their bounden duty to restore him to the "pension-roll," and cause his pension to be paid. (Laws of 1871, chap. 126; id., chap. 127, § 5.) The act of 1871 is merely a collating and embodying in one separate and distinct statute a variety of statutory provisions in regard to the police life insurance fund, before then enacted, and scattered through the several acts in respect to the "metropolitan police" and the city charter of 1870. (Laws of 1857, chap. 569, §§ 24, 25; Laws of 1860, chap. 259, § 67; Laws of 1868, chap. 535, § 2; Laws of 1870, chap. 137, § 66; id., chap. 383.)

Charles F. MacLean for respondents. This court cannot review the legislation of the board of police on a common-law

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writ of *mandamus*. (*People, ex rel. Savage, v. B'd of Health*, 12 Abb. Pr. 88.) If the board of police had no power to pass the resolution complained of, it has no legal existence, and the remedy for the consequences thereof is then by action. (*People v. Mayor, etc.*, 2 Hill, 9.) The right of the relator to that which he demands is in doubt, and a *mandamus*, therefore, will not be granted. (*People, ex rel. Perkins, v. Hawkins*, 46 N. Y. 9.) Plenary discretion over the fund, both as to pensions and pensioners, was given to the board by the act of 1871, and this court cannot interfere with the exercise of that discretion. (*People, ex rel. Clapp, v. B'd of Police*, 12 N. Y. Sup. Ct. 457.) The relator, having accepted his pension, must be held to have had notice of all the provisions of the act, including the one that neither his pension, nor the payment of it, should be chargeable as matter of right upon the fund. (*Baker v. City of Utica*, 19 N. Y. 326 ; Laws of 1871, chap. 126, § 5.)

FINCH, J. The right of the relator is the logical result of three propositions which sustain his claim if they interpret the statute provisions correctly. Two of these propositions are possibly sound, but the third, upon which the whole contention hinges, is in our opinion erroneous. That the "police life insurance fund" belongs to the State; that it is accumulated by legislative power and authority from taxes or assessments imposed upon officers, and from abandoned and unclaimed property which would otherwise revert to the sovereign; and that the State, therefore, is the grantor of the fund or its income to those who are the beneficiaries, — is the substance of the relator's first proposition, and may be conceded. That the defendants, in their official capacity as "police commissioners of the city," are the trustees of the fund, with power of management, and authorized to select and designate the beneficiaries under the restrictions and conditions imposed by the statute, which is their power of attorney, is the relator's second proposition, and may also be conceded. But that, when they have once determined the facts, and designated, in the manner provided by the statute, an individual as such beneficiary, and

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fixed the amount of the pension, their power is spent and the beneficiary holds under a grant from the State and not dependent upon the discretion of the trustees; this, which is the relator's final proposition, and discloses the pith of the controversy, we cannot admit.

Reasoning from the character of the fund as in the nature of a charity, although that is not to be said without some serious qualification, and from the changeable and uncertain sources of supply from which it is fed, we should expect to find the discretion of the chosen trustees broad enough to reach emergencies naturally to be expected, and unfettered by claims upon the fund fastened by vested rights and mandatory provisions. Such discretion is conferred by the act of 1871. (Chap. 126, § 5.) The section referred to contains a double provision. As to members of the police force, and their widows and children for whom pensions are provided by a previous section (§ 4), it specifically enacts that "the board of police may, in its discretion, at any time" order such pension, or any part thereof, to cease. Then follows a general and broad provision that nothing in the act itself, or in any other act, "shall render the granting or payment of any pension obligatory upon the board of police, or board of trustees, as chargeable as matter of right upon said police life insurance fund." Section 6, which follows, gives authority to the board of police to dismiss from office "any captain, sergeant, clerk, or surgeon" and place him on the pension-roll for an amount equal to half-pay. The relator contends that the words "granting or payment" mean one and the same thing and not two different things. On the contrary, we think the evident meaning of the legislature was that no pension, whether to members of the force or dismissed officers, should at any time or in any manner be chargeable upon the fund as matter of right; and that both the original "granting" of the pension, and its after "payment" should rest in the wise discretion of the trustees. They could all the time know the condition of the fund, and pay it out where most needed and to the most deserving, and purposely the entire matter was put within their con-

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trol. We can see no reason why the legislature should have intended to discriminate in favor of the retired officer, and against the maimed or disabled member, or the widow or children of one killed in the service. It is conceded that they have no right as against the fund, and are subject wholly to the discretion of the board. We discover no reason why the pension of the retired officer should have any firmer hold upon the fund. In the construction of a statute, effect must be given, if possible, to all of the language employed. (*People v. McGloin*, 91 N. Y. 250.) We ought not to treat the word "payment" as synonymous with "granting" and so superfluous, where it has in the frame of the law its own pertinent application. It is said, however, that the final clause of section 5 is superfluous in its application to the pensions named in section 4, because as to them there was already a provision permitting the discontinuance of a pension. That provision, however, said nothing as to the original grant and the discretion of the board in that respect, and upon that the final clause could operate, while as to other cases it affected both the original grant of the pension and its payment thereafter. We think the application for a *mandamus* was properly denied.

The order of the General Term should be affirmed, with costs.

All concur.

Order affirmed.

WILLIAM GIBSON, Respondent, v. THOMAS LENANE et al., Appellants.

94	183
117	304
94	183
130	577

Under the Mechanics' Lien Law for the city of New York (Chap. 379, Laws of 1875) a sub-contractor or material-man can acquire a lien only to the extent of the sum due from the owner to the contractor at the time of filing the lien.

If the owner has prior to that time at the request of the contractor assumed an obligation to pay another sub-contractor or material-man, to the extent of such obligation, it constitutes a payment.

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Where, therefore, the owner has prior to the filing of a lien accepted orders drawn upon him by the contractor, in favor of other sub-contractors or material-men, and the contractor has thereupon receipted as for so much payment, to the full amount of his remaining liability upon the contract, no lien is acquired.

It seems that such an order and its acceptance operates as an equitable assignment of so much of the liability as is required to satisfy the order, and the owner's liability to the contractor ceases to that extent.

An extension of time for payment agreed upon between the owner and the payee does not affect the character of the order or its effect as payment. So also if the liability of the owner is assumed at his request and for his benefit by a third person, and this is accepted as payment by the contractor, so far as subsequent liens are concerned, it is payment.

(Argued November 19, 1888 ; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made the first Monday of January, 1882, which modified, and affirmed as modified, a judgment entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

Joshua M. Van Cott for appellants. The referee's conclusion of law, that the acceptances did not constitute a payment until they were "actually paid," was erroneous. (*Post v. Campbell*, 83 N. Y. 279, 284; *Payne v. Wilson*, 74 id. 348, 355-6; *Crane v. Genin*, 60 id. 127, 131; *Southard v. Walsh*, 77 id. 302, 303.) The effect of an order drawn by the contractor in favor of a sub-contractor upon the owners, and accepted by the latter, was an equitable assignment of so much of the contract moneys as would cover the order. (*Stone Dressing Co. v. St. James' Church*, 61 Barb. 489; *Risley v. Bank*, 83 N. Y. 318; *People, ex rel. Dannat, v. Comptroller*, 77 id. 45; *Shuttleworthy v. Bruce*, 7 Robt. 160; *Muir v. Schenck*, 3 Hill, 228, 238; *Wells v. Williams*, 39 Barb. 567; *Lowrey v. Steward*, 25 N. Y. 239; *Morton v. Naylor*, 1 Hill, 583; *Field v. Mayor, etc.*, 2 Seld. 179.) By the giving and acceptance of the orders, the contractors *pro tanto* lost their right of recourse against the owners,

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and the owners incurred an absolute liability to the payees. (1 Parsons on Contracts, 221; Chitty on Contracts [10th Am. ed.], 146; 1 Addison on Contracts, § 374.)

Samuel Hand for respondents. Defendants, Lenane, cannot deduct the amount of the orders. (Laws of 1875, p. 436, § 1; *Post v. Campbell*, 83 N. Y. 282.) The whole policy of the lien law is to protect the sub-contractor and to prevent collusion or departure from the terms or manner of payment provided by contract, and the equities of the lienor are always recognized as superior to those of the owner. (*Devlin v. Mack*, 2 Daly, 94.)

RUGER, Ch. J. The plaintiff by this action seeks to foreclose a mechanic's lien, arising under chapter 379 of the Laws of 1875, upon premises situated in the city of New York, belonging to Patrick and Thomas Lenane, and which lien was claimed to have been perfected by the filing of the proper papers therefor, on the 3d day of October, 1879.

The owners, and Smith & McKenzie, original contractors, and William Hall & Sons, prior lienors, were each made parties defendant to the foreclosure.

This lien was claimed to exist for the price of labor and materials furnished to Smith & McKenzie by the plaintiff, in the erection of two houses on said premises, under a building contract between the owners and contractors.

On the trial it appeared that William Hall & Sons had also filed the necessary papers to create a lien upon said premises, as of the date of September 30, 1879, upon a claim for supplies furnished to the said contractors, Smith & McKenzie, to be used in the building of said houses.

Upon the foreclosure of these liens the defendants, Lenanes, answered that they had paid the said Smith & McKenzie the full consideration for the building of said houses previous to the date of the filing of the attempted liens.

It was stipulated that the only question to be raised on the appeal was whether such payments had been made by the defendants, Lenanes, to the contractors, Smith & McKenzie, as

precluded the plaintiff or William Hall & Sons from acquiring liens under the statute.

The finding of the referee states that on the 30th day of September, the date of the filing of the first lien herein, there was due to Smith & McKenzie from the Lenanes, upon said contract, the sum of about \$1,100. This result was reached by holding as a question of law, that the said Lenanes were not entitled to credit for the amount of several orders drawn upon said owners by Smith & McKenzie, in favor of parties furnishing labor and materials under said contract, and which had been, previous to the filing of any liens, duly accepted by them payable at a future date, and amounting in the aggregate to nearly \$2,000.

We think the referee erred in excluding the amount of those orders as payments upon the contract. Their allowance upon the contract would have shown that the entire claim of the contractors had been extinguished by payment before the time of the filing of the attempted liens. It is provided by the statute in question, "that the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay at the time of the filing of the claim."

It expressly appears by the findings of the referee that each and all of the orders were accepted by the owners, or by their agent on their behalf, prior to the date of the filing of the first lien, and that all of said orders were included in the amounts mentioned in a release subsequently executed by Smith & McKenzie to the Lenanes.

We think that the acceptance of these orders by the Lenanes, or by their agent in their interest, operated as payment upon the contract in question from the time of acceptance, and should have been allowed to the owners as credits upon the accounting between them and Smith & McKenzie. The right of subcontractors and material-men under the statute to establish a lien upon the property of an owner depends upon the extent of the liability of such owner to the contractor at the date of the filing of the lien. The extent to which such a party can acquire a lien, as against the owner, is limited to the sum which the owner still remains liable to pay the contractor upon the

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contract at the time the lien attaches. (*Crane v. Genin*, 60 N. Y. 127.)

If the owner, at the request of the original contractor, prior to an attempt to create liens by any one, assumes a legal obligation to pay sub-contractors or material-men for labor or material used in the erection of a building, it constitutes a valid payment upon the contract to the extent of such obligation. (*Garrison v. Mooney*, 9 Daly, 218.)

Unless prohibited by the statute, it is competent for the owner and contractor to agree upon the method and time of payment for moneys due or to become due upon a building contract; and when payment is made in accordance with such agreement it is binding upon all parties, unless impeached for fraud or collusion. (*Crane v. Genin*, *supra*; *Payne v. Wilson*, 74 N. Y. 348.)

It is also entirely competent for the owner, upon accepting an order drawn upon him by the contractor, to make an arrangement with the payee for its future payment, and such extension of the time of payment between the owner and payee would not extend the application of such acceptance as payment upon the original contract.

The acceptance of the order by the owner operates as an equitable assignment of so much of the fund in his hands as is required to satisfy the order, and the contractor's interest therein, thereby ceases to that extent, whether such fund exists in the form of a debt or moneys held for his use. (*Risley v. Phenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; *People, ex rel. Dannat, v. Comptroller*, 77 N. Y. 46.)

If the fund exists in the form of a debt due to the drawer of the order, the acceptance thereof by the debtor operates as a novation of the debt to the amount of such order. (1 Parsons on Contracts, 221.)

But we think also that there is still another principle upon which the owners should have been credited with the amount of the orders in question. The evidence shows that each one of these orders was, at the time of its acceptance, expressly receipted for as a payment upon the contract by Smith & Mc.

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Kenzie. The assumption of an absolute obligation by a debtor to a third person, at the request of the creditor and upon his agreement that it shall operate as a payment upon the debt, extinguishes the liability of the debtor upon the original demand to the amount of the obligation assumed. (*Southard v. Walsh*, 77 N. Y. 301.)

It is entirely immaterial when such obligation becomes payable, provided the owner, or any one in his behalf, has become unconditionally bound to pay it, and it has been accepted as a payment by the several parties interested therein. This would be so, even if the obligation incurred were the note of the debtor alone, but it is more especially so where the obligation of a third party is transferred by the debtor to the creditor, and received by him in payment of his demand.

So far as this question is concerned, it makes but little difference what character is assigned to McArdle, the person by whom the obligation was incurred; whether he be regarded as the agent of the owners, or as a stranger to the transaction. If the liability is assumed by a third person, at the request of, and for the benefit of the owner, and is accepted as payment by the parties, the same result would follow as though the owner had assumed the obligation primarily.

It also appeared that one of the orders, which was denied application as a payment by the referee, consisted of an original liability for \$549.50, assumed on the 28th day of August, 1879, by the agent of the Lenanes to the defendants, William Hall & Sons, for the purchase of materials to be used in the buildings in question, at the joint request of the contractors and William Hall & Sons. The agent of the Lenanes, at the time of assuming this liability, agreed with William Hall & Sons that they would pay the amount thereof at a subsequent time, and actually did pay it on the 10th day of October thereafter. The amount of this order exceeded the sum of the lien which was awarded below to the defendants, William Hall & Sons, and the right of the owners to its allowance as a payment, so far as the Halls were concerned, was unquestionable. (*Post v. Campbell*, 83 N. Y. 279.)

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The application of these principles to the case in hand leads to the conclusion that there was nothing owing by the defendants, the owners, to Smith & McKenzie at the date of the filing of either of the liens in question, and nothing upon which the attempted liens could take effect.

The judgment of the General Term, and that entered upon the report of the referee, should be reversed; and the referee having found the facts which entitle the defendants to a judgment, judgment is, therefore, ordered for the defendants, the owners.

All concur; ANDREWS, J., concurring in result.

Judgment accordingly.

THOMAS SIMPSON, Jr., Appellant, v. EUPHEMIA P. DEL HOYO,
Impleaded, etc., Respondent.

94	189
115	506
94	189
116	303

94	189
d 160	49
j 160	68

As against a purchaser in good faith and for value of a mortgage upon land, executed by one in possession of and holding the legal title to the land, the grantor of the mortgage is estopped from claiming that the conveyance was induced by fraud on the part of the latter.

Although the mortgage may have been assigned successively to several participants in the fraud or *mala fide* purchasers, having reached the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded grantor are cut off.

The rule that the purchaser of a non-negotiable chose in action takes it subject to all the equities existing between the original parties, and to all the latent equities of third persons does not apply.

In such a case, however, the fraud being established, the burden is upon the holder of the mortgage, of proving both that he purchased for value and in good faith.

In an action to foreclose such a mortgage it appeared that the land had been reconveyed to the original owner by the fraudulent purchaser and that the former had after the reconveyance, and in ignorance of the plaintiff's mortgage, made payments upon a mortgage which was a lien upon the premises at the time of the conveyance by her. *Held*, that she was entitled to be subrogated to an interest in the prior mortgage equal to the sums so paid.

(Argued November 19, 1883; decided December 4, 1883.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made February 3, 1882, which affirmed a judgment in favor of defendant, Del Hoyo, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by the defendant Rosa Lowenstein to Henry Lowenstein, and by him assigned to plaintiff.

The material facts are stated in the opinion.

Abram Kling for appellant. The right of the plaintiff to recover in this action does not depend upon the actual title or authority of Rosa H. Lowenstein, with whom he dealt, but rests upon the acts of the defendant Del Hoyo in clothing her grantee with the apparent ownership of the property, and right of disposition, which precludes her from disputing the title or authority she has apparently conferred. (*McNeil v. Seventh Nat. B'k*, 46 N. Y. 335; *Moore v. Metropolitan Nat. B'k*, 55 id. 41; *Dillaye v. Commercial B'k*, 51 id. 345; *N. Y. & N. H. R. R. v. Schuyler*, 34 id. 60; *People v. B'k of North America*, 75 id. 549; *First Nat. B'k v. Stiles*, 22 Hun, 345; *Fitzgerald v. Fuller*, 19 id. 180; *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, id. 371; *Zink v. People*, 77 N. Y. 114.) Where property is obtained by fraud the owner has no remedy against a *bona fide* purchaser of the same. (*Bassett v. Spofford*, 45 N. Y. 392; *Zink v. People*, 77 id. 121.) An assignee of a mortgage takes the same subject to the equities of third persons, except where such person, by reason of his act, has misled the assignee, when an estoppel will operate against the party whose act created it. (*Moore v. Metropolitan B'k*, 55 N. Y. 41; *McNeil v. Fourth Nat. B'k*, 46 id. 325; *Green v. Warnick*, 64 id. 220, 224.) The plaintiff is protected by the Recording Acts, being a purchaser in good faith for a valuable consideration. (2 R. S. [6th ed.] 1138, § 1; *Decker v. Boice*, 83 N. Y. 215; *Page v. Waring*, 76 id. 469; *Acer v. Westcott*, 46 id. 384; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Hall v. Nelson*, 23 Barb. 88; *Viele v. Wilson*, 82

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N. Y. 32; *Williamson v. Brown*, 15 id. 354; *Campbell v. Vedder*, 1 Abb. Ct. App. 295; *Gage v. Waring*, 76 N. Y. 469; *Purdy v. Mitchell*, 42 id. 334; 3 Washburn on Real Property, 283; Gerard on Titles [2d ed.], 592.) A party who can call a competent witness cannot give evidence of his declarations. (*Budd v. Dana*, 12 Wend. 142.) In no event could the declarations of Lowenstein, as the former assignor of the plaintiff, be admitted in evidence to attack the assignment or mortgage as against the plaintiff, who is a subsequent purchaser for value. (*Paige v. Cagwin*, 7 Hill, 361; *Booth v. Swezy*, 8 N. Y. 276; *Tousley v. Barry*, 16 id. 497; *Earle v. Clute*, 2 Abb. Ct. App. 1; *Bullis v. Montgomery*, 50 N. Y. 352; *Foot v. Beecher*, 7 Abb. N. C. 358.)

John M. Bowers for respondent. Plaintiff, being the innocent assignee for value of Henry M. Lowenstein, takes subject to all the equities between the defendant and Henry M. Lowenstein. (*Bush v. Lathrop*, 22 N. Y. 535; *Trustees of Union College v. Wheeler*, 61 id. 88, 105, 115; *Westfall v. Jones*, 23 Barb. 9, 11.) A mortgage under our laws is a mere chose in action, and aside from the force of the recording statute, an assignee thereof, so far as concerns his right as such to enforce the same, must be treated like the assignee of any other chose in action. (*Ingraham v. Disborough*, 47 N. Y. 421; *Green v. Warnick*, 64 id. 220; *Reid v. Sprague*, 72 id. 457; *Westbrook v. Gleason*, 79 id. 23, 29.) Plaintiff, standing as he does in the shoes of Henry M. Lowenstein, is not in a position to claim an estoppel, and must abide by the result of the wrongful act of his assignor. (*McNeil v. Tenth Nat. B'k*, 46 N. Y. 335; *Moore v. Metropolitan Nat. B'k*, 55 id. 41; *Davis v. Beckstein*, 69 id. 440-442.) As the mortgage was taken as collateral to another and pre-existing debt, all equities between all parties interested were opened. (*Phoenix Ins. Co. v. Church*, 81 N. Y. 221.) Defendant having, in ignorance of the alleged lien of the plaintiff's mortgage, paid on account of a prior mortgage large sums for principal, interest, costs of foreclosure, and taxes, in the event the plaintiff had established his

mortgage, was entitled to have these sums reinstated as prior liens thereto. (*Barnes v. Mott*, 64 N. Y. 397; *Green v. Milbank*, 3 Abb. N. C. 138; *Snelling v. McIntyre*, 6 id. 469.) The utmost the appellant can claim is that the record of his assignment was a conveyance and protected him against any other unrecorded conveyance. (*Greene v. Warnick*, 64 N. Y. 220; *Crane v. Turner*, 67 id. 437; *Decker v. Boice*, 83 id. 215, 219.) Evidence as to whether plaintiff was a *bona fide* purchaser was material and proper. (*Crary v. Sprague*, 12 Wend. 41; *Cuyler v. McCartney*, 40 N. Y. 221; *Dewey v. Moyer*, 72 id. 70-80.)

EARL, J. In October, 1877, Mrs. Del Hoyo, being the owner of certain real estate in the city of New York, was induced, by false pretenses and fraudulent representations of Henry M. Lowenstein, to convey such real estate to his daughter, Rosa H. Lowenstein. Thereafter she, upon some alleged consideration passing to her from her father, executed to him a mortgage upon the same real estate to secure the payment of \$1,000, which was collateral security for the payment of her bond for the same amount. Subsequently he assigned the bond and mortgage to this plaintiff, who, as we must assume upon this appeal, paid value for the same, acting in good faith, with no knowledge whatever of the fraud committed upon Mrs. Del Hoyo, or of her equities. Subsequently to the execution and assignment of the mortgage, Miss Lowenstein reconveyed the land to Mrs. Del Hoyo. This action was to foreclose the mortgage; and Mrs. Del Hoyo in her answer alleged the fraud perpetrated upon her by Lowenstein as a defense to the action.

It must be conceded that if Lowenstein himself had continued to hold the mortgage, and were plaintiff in this action, attempting to foreclose the same, Mrs. Del Hoyo would have a good defense; and her defense has thus far been sustained upon the ground that the plaintiff as assignee could have no better right or position as against her than Lowenstein, the assignor, could have had. The courts below applied to this case the familiar rule that the purchaser of a non-negotiable chose in action takes it subject to all the equities existing between

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the original parties thereto, not only, but to all the latent equities of third persons. The general rule of law, as thus stated, has been many times announced in the decisions of this court and cannot be disputed. But it has its exceptions, and we do not think it is applicable to this case.

Mrs. Del Hoyo conveyed the real estate to Miss Lowenstein by an absolute deed with full covenants, thus conferring upon her the apparent title and ownership of the property, and under that conveyance she took possession of the property, and was in the possession thereof at the time of the execution of the mortgage, and of its assignment to the plaintiff. Mrs. Del Hoyo thus clothed her grantee with the apparent right to deal with the property as owner. She could have conveyed the property to a *bona fide* purchaser, and he would have taken a title, good as against her and against her grantor, Mrs. Del Hoyo.

When real or personal property is obtained from one by fraud upon the purchase thereof, and the vendor thus intentionally parts with the title, the vendee can always, by a sale to a *bona fide* purchaser for value, give a title good as against the vendor. If Miss Lowenstein could give a conveyance, good as against her grantor, she could execute a mortgage to one parting with value, and taking it in good faith, which would be equally effectual, as she could have done if the property had been personal instead of real. So if this mortgage to her father had been taken by him for value, and in good faith, he could have enforced the same against the land.

The assignee of the mortgage holds under Miss Lowenstein. He took it on the faith that she, as the apparent owner of the real estate, had the right to execute it. When he took it he could inquire of her whether it was valid and effectual, she at the time having the legal title to the land; and when his inquiries had extended thus far he was bound to go no further.

It would lead to great inconvenience and great insecurity, if persons taking or purchasing mortgages were obliged to go back of the mortgagor who owned the land and had the record title thereto, and at their peril ascertain whether any fraud had been perpetrated upon some prior owner of the land.

This mortgage was not purchased on the faith or credit of the assignor. He did not even guarantee the payment of the same, but it was bought on the faith and credit of the mortgagor's title. In such a case, as against the plaintiff, an innocent *bona fide* purchaser of the mortgage, Mrs. Del Hoyo is estopped from denying the title of her grantee, and her right to deal with the property as owner. For this conclusion the cases of *McNeil v. Tenth National Bank* (46 N. Y. 335; 7 Am. Rep. 341), *Moore v. Metropolitan National Bank* (55 N. Y. 41; 14 Am. Rep. 173) and *Greene v. Warnick* (64 N. Y. 220), furnish ample authority.

But without invoking the rule of law announced in the cases cited, there is another ground upon which our decision may rest. It is a familiar rule of law that a fraudulent purchaser of real or personal property obtains the legal title to the property purchased, and that he may convey a good title to any *bona fide* purchaser from him for value. He may not only convey the property, but he may deal with it as owner, and may mortgage it; and whoever purchases the property or takes a mortgage thereon from him or under him, in good faith, for value, or deals with him in good faith in reference thereto will be protected against the claims of the defrauded vendor. The real estate may be conveyed, or a mortgage thereon may be assigned to several successive participants in the fraud, or several successive *mala fide* purchasers. But the moment the real estate or the mortgage reaches the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded owner are cut off. (*Bumpus v. Platner*, 1 Johns. Ch. 213; *Demarest v. Wynkoop*, 3 id. 129; *Griffith v. Griffith*, 9 Paige, 315; *Smart v. Bement*, 4 Abb. Ct. App. Dec. 253; *Paddon v. Taylor*, 44 N. Y. 371.)

The trial judge held that it was immaterial to determine whether or not the plaintiff was an innocent purchaser of the mortgage for value. In this, as we have seen, he erred. Upon the new trial, the fraud being established, it will be incumbent upon the plaintiff to show satisfactorily how he came by the mortgage, and that he took the same for value; and, in order

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to give him the protection of the principles of law we lay down, the court must find, not only that he purchased the mortgage for value, but that he purchased it innocently and in good faith.

Mrs. Del Hoyo claims a right to be subrogated to an interest in a mortgage for \$10,000, which was a lien upon the real estate at the time of the conveyance by her and until after the reconveyance to her, for the amounts paid by her upon that mortgage in ignorance of plaintiff's mortgage. This claim is, upon the facts found by the court, well founded, and may be allowed and adjusted upon the new trial, in case she fails entirely to defeat plaintiff's mortgage. (*Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625; *Green v. Milbank*, 3 Abb. N. C. 138; *Snelling v. McIntyre*, 6 id. 469.)

Mrs. Del Hoyo seems to have been greatly wronged, and should have all the relief any rule of law can give her without violating the rights of any other person equally innocent with her.

The judgment should be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

MICHAEL H. HAGERTY et al., Appellants, v. BENJAMIN ANDREWS et al., Respondents.

The court has no power, on motion of a party defendant, to strike out all the allegations of the complaint referring to himself, simply because they are irrelevant to an alleged cause of action against some other defendant; neither the question as to whether the moving party was properly made a defendant, nor the question as to whether the facts alleged make out a good cause of action as to him, can be raised on such a motion.

The power to strike out, on motion, averments in a pleading because of irrelevancy, applies simply to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleadings against the moving party.

(Submitted November 20, 1883; decided December 4, 1883.)

Statement of case.

APPEAL from order of the General Term of the City Court of Brooklyn, made September 5, 1883, which affirmed an order of Special Term striking out all the averments of the complaint relating to defendants Andrews and Husted.

This action was brought for the partition of certain lands owned by plaintiffs and defendant Nichols as tenants in common.

The complaint alleged that defendants Andrews and Husted claim to have liens upon the premises, under and by virtue of certain certificates of sale thereof for the non-payment of taxes. The complaint asked for a determination as to the validity of such liens. The defendant Nichols averred in his answer that the alleged liens are null and void, because the proceedings were not in conformity with the requirements of the statute. The motion to strike out these allegations was based on the ground that the certificates are not liens and do not constitute an interest in the lands; that the validity thereof cannot be determined in this action, and that said allegations are irrelevant.

John T. Barnard for appellants. In partition under the Revised Statutes, creditors having specific liens upon an undivided share of the premises sought to be partitioned could be made parties, and persons holding general liens or incumbrances be brought in by notice, so as to bind them by the sale. (2 R. S. 318, §§ 10, 49, 43.) The plaintiff may at his election, among other things, make a person having a lien or interest which attaches to the entire property, a defendant in the action. (Code of Civ. Pro., § 1539.) The title or interest of any defendant, as stated in the complaint, may be controverted in his answer or the answer of any other defendant, and the issues so joined must be tried and determined in the action. (Code of Civ. Pro., § 1543.) If the persons interested were known they should be made parties to the suit or proceeding. If not known and in being they should be made parties in effect by the publication of the notice required by statute. (*Mead v. Mitchell*, 5 Abb. Pr. 92; *S. C.*, 17 N. Y. 210;

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Bogardus v. Parker, 7 How. Pr. 305.) A creditor by an entire lien on the whole premises was not a necessary party in partition, but if made a defendant the court could determine the amount and validity of the lien. (*Dunham v. Minard*, 4 Paige, 441; *Halsted v. Halsted*, 55 N. Y. 442; *Townshend v. Townshend*, 1 Abb. N. C. 81; *Mead v. Mitchell*, 17 N. Y. 210; *Austin v. Ahearne*, 61 id. 6, 21.) The word "lien" in law signifies an obligation, tie or claim annexed to or attaching upon any property; without satisfying which such property cannot be demanded by its owners. (4 Jacobs' Law Dic., by Tomlins. 159; *Storm v. Waddell*, 2 Sandf. Ch. 494; 2 Story's Eq. 1215, 1216.) The legislature has declared certificates of sales for unpaid taxes, assessments and water-rates in the city of Brooklyn to be liens. (Charter of 1854, title 5, § 26; Laws of 1854, chap. 384; Laws of 1859, chap. 396, § 20; *Crook v. Andrews*, 40 N. Y. 547; *Newell v. Wheeler*, 48 id. 486.) In this State statutes must be read according to the most natural and obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. (*Waller v. Harris*, 20 Wend. 561; 17 Johns. 475; 13 N. Y. 78; *Newell v. People*, 3 Seld. 97; *McCloskey v. Cromwell*, 1 Kern. 593; *Clarkson v. Hudson R. R. Co.*, 2 id. 394; *Johnson v. Hudson R. R. Co.* 49 N. Y. 455.) The inquiry as to the existence and amount of the lien involves the further question of its validity, if the party against whose share it is claimed to exist contests it. This could always be done in partition. (*Dunham v. Minard*, 4 Paige, 441; *Halsted v. Halsted*, 55 N. Y. 442; Code of Civ. Pro., §§ 1539, 1540, 1546.)

John Andrews for respondents. Only such parties who have a lien or interest which attaches to the entire property can be made a party to an action for partition. (Code, § 1539.) The plaintiff having elected to make the defendants, Andrews and Husted, parties, he should set forth and establish the nature of their lien in order that it may be charged against the premises, or the interest or share to which it attaches. (Code,

§ 1540.) The validity of the certificates of sales for taxes could not be tried in this action. (*Knap v. Hungerford*, 7 Hun, 588; *Van Schuyver v. Melford*, 59 N. Y. 426; *Albany City Savgs. Instn. v. Burdick*, 87 id. 40.)

RUGER, Ch. J. The question attempted to be raised by the respondents in this proceeding was, whether, upon the facts stated in the complaint, they were properly made parties defendant in the action.

The objection went to the entire cause of action, as stated against them, and the necessary effect of a decision in their favor was to leave them in as parties to the action, but with nothing in the pleadings to indicate their connection with the subject-matter, except the allegations in the answer of their co-defendants George M. Nichols and Mary Jane, his wife, alleging the invalidity of their liens.

It may well be doubted, even if the order appealed from should be allowed to stand, whether the respondents have secured any exemption from their responsibility as defendants in the action. It is quite clear that under section 1543 of the Code of Civil Procedure, they would still be obliged to litigate with their co-defendants, the Nichols, the validity of their liens upon the premises sought to be partitioned, notwithstanding the allegations in the complaint relating to their interest in the premises had been struck out by order of the court.

But it is quite evident that the question as to whether a person has been properly made a party defendant in an action cannot be raised upon a motion to strike out the allegations in the complaint referring to his interest in such action. The Code authorizes the party aggrieved thereby to move to strike out *irrelevant, redundant or scandalous* matter contained in a pleading, but it is a new application of the privileges conferred by this provision to strike out a pleading because it does not state a good cause of action against the moving party.

Questions as to the sufficiency of a pleading in stating a cause of action or defense against a party, or as to his liability

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upon a given state of facts, can properly be raised only by a demurrer to such pleading. When the pleading contains the semblance of a cause of action or defense its sufficiency cannot be determined upon a motion to strike it out as irrelevant or redundant. (*Walter v. Fowler*, 85 N. Y. 621.)

It cannot be claimed that the portions of the complaint which were struck out by the order appealed from were either scandalous or redundant; and it follows that if they are struck out at all it must be upon the ground that they are irrelevant. It would be confounding the remedies provided by the several sections of the Code, to hold that the motion to strike out matter from a pleading was applicable to a case where there was an absence of allegations of fact sufficient to constitute a cause of action or defense.

The power given to a court to expunge matter from a pleading, upon motion, for irrelevancy, refers to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleading against the party moving to expunge, and does not enable a party to strike out allegations relating to himself because they are irrelevant to an alleged cause of action against some other party.

We are, therefore, of the opinion that this appeal does not bring up the question attempted to be raised, and which was argued before us, and that we cannot properly pass upon that point.

The orders of the General and Special Terms must, therefore, be reversed, with costs in both courts to the appellants.

All concur.

Orders reversed.

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In the Matter of the ATTORNEY-GENERAL v. THE CONTINENTAL LIFE INSURANCE COMPANY, EDWARD J. HANCY, Purchaser, Appellant.

It is within the discretion of the court to grant or refuse the application of a purchaser, at a sale by a receiver of an insolvent insurance company,

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for an order requiring the receiver to complete the sale. The contract, while executory, is subject to the supervisory power of the court. The purchaser by making the application submits himself to its jurisdiction, and if in its judgment the contract is inequitable, it may deny the motion.

Where, therefore, on such a motion it appeared that the petitioner bid off certain shares of bank stock of the par value of \$27,000 for the sum of \$107; that it was known to the purchaser, but not to the receiver at the time of the sale, that in an action brought by certain stockholders of the bank, in behalf of themselves and the other stockholders, against its directors, it had been adjudged that, because of misconduct, the directors were liable to the stockholders for the market value of the stock, at a time specified, and also for an assessment of one hundred per cent, which had been paid by the stockholders, — *held*, that the court properly refused to grant the motion; that although there was no technical legal duty resting upon the purchaser to disclose his knowledge, and even if the receiver was chargeable with negligence, the court was not bound to direct a completion of the sale.

(Argued November 20, 1883; decided December 4, 1883.)

APPEAL by Edward O. Hancy from order of the General Term of the Supreme Court, in the third judicial department, made July 2, 1883, which affirmed an order of Special Term denying a motion on the part of said Hancy to compel the receiver of the Continental Life Insurance Company, appointed in the proceeding above entitled, to execute to him, said Hancy, an assignment of thirty-six shares of the stock of the Atlantic National Bank, which had been bid off by him at a sale of the assets of the insolvent company by said receiver.

The material facts are stated in the opinion.

Geo. C. Holt for appellant. The right of action against the directors of the bank was an incident of the ownership of the stock, and passed with it upon its sale. (Morawitz on Corporations, § 320; *Grissell v. Bristowe*, L. R., 3 C. P. 112; *Boardman v. L. S., etc., Co.*, 84 N. Y. 178, 179; *Johnson v. Underhill*, 52 id. 212; *Hyatt v. Allen*, 56 id. 553; *Manning v. Quicksilver Co.*, 24 Hun, 360; *Jermain v. L. S. Co.*, 91 N. Y. 483.) The right of a stockholder to recover damages from the directors of a corporation, caused by their negligence

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or misconduct, is analogous to a right to a dividend. (*Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Graves v. Gouge*, 69 id. 154; *Robinson v. Smith*, 3 Paige, 222; *Nelson v. Burrows*, 9 Abb. N. C. 280; *Hand v. Burrows*, id., note; *Scott v. De Peyster*, 1 Edw. Ch. 513; *Allen v. N. J. Co.*, 49 How. Pr. 14; *Cunningham v. Pell*, 5 Paige, 607; *Smith v. Rathbone*, 66 Barb. 402; *McNeil v. Tenth Nat. B'k*, 46 N. Y. 325.) The incident passes by the grant of the principal. (*Jackson v. Blodgett*, 5 Cow. 252; *Langdon v. Buell*, 9 Wend. 80; *Rose v. Baker*, 13 Barb. 230; *Patterson v. Hall*, 9 Cow. 747; *Bowdoin v. Coleman*, 6 Duer, 82; *Congress, etc., Co. v. High Rock Co.*, 45 N. Y. 291; *Oneida B'k v. Ontario B'k*, 21 id. 490; *Tracy v. Talmadge*, 14 id. 192; *Gewig v. Sitterly*, 56 id. 214; *Bolen v. Crosby*, 49 id. 183; *Pier v. George*, 86 id. 183; *Spears v. Mayor*, 89 id. 369; *Kloch v. Buel*, 56 Barb. 398; *Parmelee v. Dunn*, 23 id. 461; *Allen v. Brown*, 44 N. Y. 228; *Merritt v. Bartholick*, 36 id. 44; *Wanser v. Cary*, 76 id. 526; *McMahon v. Allen*, 35 id. 403; *Hicks v. Cleveland*, 48 id. 2.) The sale of the stock carried with it the right of action against the directors under the general rule that a contract should be so construed as to give some effect to it rather than to render it meaningless and inefficacious. (*Sherman v. Elder*, 24 N. Y. 381; *Fitch v. Rathbun*, 61 id. 581; *Waldron v. Willard*, 17 id. 466.) The receiver was vested absolutely with the assets of the corporation. (*Att'y-Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438; *Bolen v. Crosby*, 49 N. Y. 183; *Pier v. George*, 86 id. 183; *Am. Ins. Co. v. Oakley*, 9 Paige, 259; *Billington v. Forbes*, 10 id. 487; *Williamson v. Dale*, 3 Johns. Ch. 290.

Edward H. Hobbs for receiver, respondent. The sale made at auction by the receiver should not be confirmed, for the reason that there was no mutual understanding between the parties as to what the one intended to sell and the other intended to purchase. (Kerr on Fraud and Mistake, 396, 406, 408; *Champlar v. Laytin*, 18 Wend. 407; *Coon v. Smith*, 29 N. Y. 392; *Smith v. Mackin*, 4 Lans. 41; *Otter v. Bre-*

voort Petroleum Co., 50 Barb. 247.) The petitioner could only take by the purchase at auction that which was offered, and he had no right to demand an instrument of transfer more ample than the terms of the sale at auction. (*Waldron v. Willard*, 17 N. Y. 466; *Harper v. Raymond*, 3 Bosw. 29; *Deming v. Bailey*, 2 Robt. 1.)

Leslie W. Russell, Attorney-General, in person, respondent. A mistake as to the thing sold prevents the mutual assent necessary to constitute a contract. (*Thornton v. Kempstead*, 5 Taunt. 786.) A concurrence of the minds of the parties as to the subject is essential. (*Trovor v. Wood*, 36 N. Y. 307.) A party is estopped from denying that the manifest intention displayed by him was his real intention. (Benjamin on Sales, 39.)

ANDREWS, J. The refusal of the receiver to transfer to the appellant the thirty-six shares of the stock of the Atlantic National Bank, held by the Continental Life Insurance Company, purchased by him at the receiver's sale, unless the purchaser would consent to the reservation of any claim which the company or the receiver, as stockholders, had against the officers of the bank, or other persons, imposed upon the purchaser the necessity of resorting to the court for relief. The plaintiff, by making his motion for a direction to the receiver, stands in the position of asking the court to approve the sale, and it was competent for the court to grant or deny the motion, as should appear to be just upon a consideration of all the circumstances.

The facts presented upon the motion show that the receiver in making the sale acted in ignorance of a material fact known to the purchaser affecting the value of the stock. This fact was, that certain directors of the Atlantic Bank in an action brought by certain stockholders of the bank in behalf of themselves and the other stockholders, had been adjudged, by reason of their misconduct as such directors to be liable to the stockholders for the market value of the stock April 23, 1873,

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immediately before the failure of the bank, and for the amount paid by them respectively upon an assessment made by the comptroller of the currency, and that under the interlocutory judgment in the stockholders' action, the Continental Life Insurance Company or its receiver, was entitled to be made a party to the action and prove its claim and have judgment therefor against the directors. An assessment had been paid on account of this stock, of one hundred per cent. By the interlocutory judgment the receiver in the absence of any special defense, was entitled, on becoming a party to the stockholders' action, to a judgment against the delinquent directors for the amount of \$2,700 paid on the assessment, with interest from the time of payment, and also for the market value of the stock at the time stated, with interest.

This large claim, which, so far as appears, was collectible, in case the judgment against the directors should be finally affirmed, was wholly unknown to the receiver when the sale in question was made. The stock was put up for sale and the appellant became the purchaser for the sum of \$107 or thereabouts, and he now insists that the claim against the directors, under the judgment in the stockholders' action passed to him as incident to the sale, and that the court is bound to direct the receiver to carry out the sale by a transfer of the stock. Assuming as the appellant contends, that a transfer of the shares would operate as a transfer of the claim, we are of opinion that the court properly refused to grant the motion. There was doubtless a complete executory contract in form for the transfer of the shares. But the contract while executory was subject to the supervisory power of the court. The court could, in the exercise of a just discretion, sanction or disapprove it, and the purchaser must be deemed to have purchased subject to this implied condition. The purchaser by invoking the power of the court, submitted himself to its jurisdiction and in deciding the question presented, the court was not bound to grant the motion if in its judgment the contract was inequitable, although there was no technical legal duty resting upon the purchaser to disclose his information in respect

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to the judgment, or although the receiver may have omitted to exercise that diligence which a prudent and careful officer ought to have done. The court in dealing with the question presented was acting in respect to the administration of a trust by one of its own officers. The receiver in making the sale acted under a misapprehension of the facts. The petitioner has acquired no fixed right to have the sale completed, and under the circumstances it seems more just that he should lose his bargain than that the trust estate should sustain the loss which may result from compelling the receiver to transfer the shares. We think the court properly refused to enforce the contract of sale and that the motion was properly denied.

The order should be affirmed, with costs.

All concur.

Order affirmed.

GEORGE BRISBANE, Appellant, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.

B. held a certificate of ten shares of the stock of a corporation; by the terms thereof the shares were transferable upon the books of the company only on production of the certificate; B. assigned and transferred the certificate to plaintiff, but no transfer was made on the company's books; after the death of B. defendant, with whom said corporation had been consolidated, without knowledge of such transfer and on representation that the certificate was lost, transferred the stock on its books to B.'s administrator, and issued to him a certificate therefor, upon his executing and delivering to it a bond of indemnity; it also paid to him certain dividends which had been declared upon the stock. In an action to compel a transfer to plaintiff of the stock, and payment of the dividends, *held*, that plaintiff was entitled to a certificate for the ten shares, as the transfer to the administrator was unauthorized; but that defendant was not liable for the dividends, as until notice or knowledge of a transfer it was justified in paying the same to the person in whose name the stock stood upon its books, or to his legal representatives; and that, as the administrator was not required by any rule of law to produce the certificate on payment to him of the dividends, his failure so to do was not such a notice as put defendant upon inquiry before payment; also that the receipt of the bond of indemnity did not affect defendant's rights or charge it with notice.

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Plaintiff gave in evidence a letter to him from defendant's assistant treasurer, which referred to a letter written by him, wherein he claimed ten shares of the company's stock. *Held*, that this was not notice to the company of ownership of the shares in controversy.

(Argued November 20, 1883; decided December 4, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1881, which affirmed a judgment, so far as appealed from, entered upon a decision of the court on trial at Special Term. (Mem. of decision below, 25 Hun, 438.)

This action was brought to compel defendant to transfer to plaintiff, on its books, ten shares of its stock, and to issue to him a certificate therefor; also to recover various stock and cash dividends which had been declared upon said ten shares.

In January, 1856, the Lackawanna and Bloomsburgh Company issued to one Samuel Benedict a certificate for ten shares of its stock, and his name was thereupon entered upon the books of said company as a stockholder. Said company, in 1873, became consolidated with the defendant, the holders of its shares of stock becoming entitled, by the terms of the consolidation, to an equal number of shares of the stock of the defendant. Prior to the consolidation, the said company declared various dividends in stock and cash, and Benedict was credited with the dividends so declared upon his ten shares. After the consolidation defendant declared other cash dividends, and a like credit was made to Benedict by it. B. died in 1865. In April, 1876, upon the representation of his administrator that the certificate issued to Benedict had been lost or destroyed, and upon receiving a bond of indemnity, the defendant issued to said administrator a new certificate for ten shares of its stock in lieu thereof. All the said dividends upon the said ten shares were paid by defendant in May, 1876, to the administrator of said Benedict (who died in 1865), except the final dividend of \$18.75, which was paid in July, 1876, to Isabel Lockhart, the assignee of said administrator. Soon after the original certificate was issued to Benedict, he transferred the

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same to the plaintiff, but it did not appear that the latter gave any notice of such transfer, or of his ownership of such stock, either to the Lackawanna and Bloomsburgh Company, or to defendant, until a short time before the commencement of this action and after the payment of dividends as above stated.

The defendant admitted that the plaintiff was entitled to the ten shares of stock. but denied his right to the dividends, and it was so held by the Special Term.

Further facts appear in the opinion.

A. N. Weller for appellants. Defendant having had "constructive notice," or notice sufficient to put it on inquiry of plaintiff's rights, is liable to him for the dividends as well as for the stock. (*Williamson v. Brown*, 15 N. Y. 354; *Baker v. Bliss*, 39 id. 70; *Reed v. Gannon*, 50 id. 345; *Hurlich v. Bumoran*, 11 Hun, 194; *Pitney v. Leonard*, 1 Paige, 461; *Pringle v. Phillips*, 5 Sandf. 157; *Whitebread v. Boulnois*, 1 Y. & O. Ex. 303; *Kellogg v. Smith*, 26 N. Y. 18; *B'k of Poughkeepsie v. Hasbrook*, 6 id. 216; *Blydenburg v. Brown*, 7 id. 140; *Clark v. Igelstrom*, 51 How. Pr. 407; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 83.) These dividends were the accretions of the original stock and belonged to its equitable owner. (*B. C. R. R. Co. v. Sewell*, 6 Am. Rep. 409; *Chew v. B'k of Baltimore*, 14 Ind. 299; 48 How. 427; 1 Story's Eq. Jur., § 400.)

Hamilton Odell for respondent. The payments were properly made by defendant. (*Smith v. Am. Coal Co.*, 7 Lans. 321; *McNeil v. Tenth Nat. B'k*, 46 N. Y. 332; *Hill v. Newichawanick Co.*, 48 How. 429; *C. & M. Co. v. Robbins*, 35 Ohio, 483; 1 Edm. Stat. 561, §§ 6, 8; *Matter of L. I. R. R. Co.*, 19 Wend. 37; *Matter of M. & H. Co.*, id. 135; *Matter of North Shore Co.*, 63 Barb. 556; *Brisbane v. D. L. & W.*, 25 Hun, 440.) The production of a stock certificate not being necessary for the collection of dividends its non-production was not, in any sense, either a suspicious or a material circumstance. (*Hill v. Newichawanick Co.*, 71 N. Y. 593, af-

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firming 8 Hun, 459; *Hoagland v. Bell*, 36 Barb. 58.) Plaintiff's action should have been at law for damages against defendant for allowing a transfer of the ten shares to Mrs. Lockhart. (*McNeil v. Tenth Nat. B'k*, 46 N. Y. 332; *N. Y., etc., Co. v. Schuyler*, 34 id. 80; *Cady v. Potter*, 55 Barb. 463; 3 Lead. Cas. in Eq. 371.)

MILLER, J. The certificate for the ten shares of stock, issued by the defendant to the administrator of Samuel Benedict, deceased, was unauthorized, as no scrip was produced showing that the deceased held the stock at the time of his death. By the terms of the original certificate it was only transferable upon the production of the same, and, it not being produced, the defendant took the risk of the administrator being the owner thereof, and, as the proof showed that he was not, the defendant was properly held liable therefor. A different rule, however, prevails in reference to the dividends, and upon the books of the company they were properly payable to the person in whose name the stock stood or his legal representative. *Prima facie*, upon the books of the company, the administrator of Samuel Benedict was the owner of the dividends, as there was nothing to show a want of title in him, and they were only transferable upon the production and surrender of the certificate. Until this was done the defendant was bound to regard him as entitled to the same and the owner thereof. His title, as it appeared upon the books, was conclusive until impeached or impaired by the certificate itself with a transfer, or other evidence, showing that the stock belonged to the plaintiff or some other party. The administrator was clearly authorized to receive the dividends as the stock stood upon the books, and the defendant was bound to pay the same unless it had some notice of a change of the title, or of a transfer of the stock, or such knowledge or information as would put it upon inquiry as to the ownership thereof. The failure of the administrator to present the certificate was not such a notice, at the time the dividends were received, as subjected the right to collect the same to suspicion or as required

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the defendant to make inquiry in regard thereto. The plaintiff had not given any such notice to the defendant as would put it on its guard in reference to the title to the stock and dividends, and there is no rule of law which imposes upon the officers of corporations the duty of requiring the production of the certificate of stock before the payment of dividends on the same. The books containing the lists of the stockholders are evidence of the ownership of the stock, and a corporation is justified in being governed thereby until proof or notice is given showing that other parties than those named therein are the owners of the stock. This case is far different from that of one where a person purchases a bond and mortgage and is chargeable with notice of any defect in the assignor's title thereto unless he requires the production of the bond. There was no notice, constructive or otherwise, which put the defendant upon inquiry in reference to the ownership of the stock in question. Plaintiff produced a letter from defendant's assistant treasurer, which referred to a letter written by him to the company, but it is not shown that the letter referred to communicated the fact that the stock had been transferred to or was claimed by the plaintiff. Although the answer to the letter shows that the plaintiff claimed ten shares of the stock of the company, yet it does not show that they were the same shares in controversy.

The fact that the bond of indemnity was executed does not aid the plaintiff's case. Its object and purpose was to indemnify the company for issuing the new certificate in place of and without the production of the old one, which the defendant had been informed and had reason to believe had been destroyed. The bond of indemnity upon its face has no relation whatever to the payment of the dividends and does not include the same. In no sense can it be regarded as a notice of any thing more than that the original certificate had been destroyed as stated therein. This was not calculated to arouse any suspicion as to the ownership of the stock or its dividends, and it fully justified the company in paying the latter to the administrator of Benedict. According to law the administrator was the ap-

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parent owner of and entitled to draw the dividends. The new certificate merely supplied the place of the one which was alleged to have been destroyed for the purpose of transfer and sale in accordance with the rules and regulations of corporations in such cases. In view of the long period of time which had elapsed since the transfer of the certificate by the original owner, and the failure to present the same to the proper officer of the company, for the purpose of obtaining a new certificate, every presumption is in favor of the good faith of the defendant's officers in the payment of the dividends in accordance with the record on the books of the company.

The judgment should be affirmed.

All concur.

• Judgment affirmed.

CATHERINE E. DODGE, by Guardian, etc., Respondent, v.
JOSEPH T. STEVENS, Impleaded, etc., Appellant.

A purchase by a trustee for himself of trust property is not absolutely void, but is voidable at the election of the *cestui que trust*.

Where the purchase is of real estate, and the title has been vested in the trustee by a conveyance, the *cestui que trust* may maintain an action to compel a conveyance to him, or in trust for him by the trustees, and it is no objection to the granting of the relief sought that the defect in his title appears upon the records.

Where, after having received a conveyance, the trustee executed a mortgage upon the real estate to one having full notice of the rights of the *cestui que trust*, held that the mortgagee might be joined with the trustee as party defendant for the purpose of affording complete relief, and freeing the title from embarrassment by setting aside the mortgage.

Under the will of D. his widow took a fee in certain real estate, determinable upon her remarriage, and plaintiff, an infant, a contingent fee, depending upon the happening of that event. Proceedings were instituted under the statute for a sale of plaintiff's interest, in which defendant T., the executor of the will of D., was appointed special guardian for plaintiff; the proceedings resulted in a sale; T., as special guardian, and the widow executed a conveyance to the purchaser, who executed to T. as such guardian a mortgage upon the lands for part of the purchase-

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money. T. foreclosed the mortgage, bidding in the lands, and receiving a conveyance in his own name, but paying no portion of the purchase-money; he executed a mortgage on the lands to defendant S., to secure a judgment recovered against him as executor. The widow subsequently remarried. In an action brought to compel the transfer of the title to, or in trust for, plaintiff, and a cancellation of the mortgage, *held*, that plaintiff was entitled to the relief sought; that conceding the court had no jurisdiction to direct the sale of plaintiff's interest, and so that the title was not divested, the court in directing the sale necessarily adjudged that the case was within the statute, and the conveyance to T. embarrassed plaintiff's title; that the action being brought to redress a violation of trust, defendants would not be permitted to defeat it by a suggestion that the apparent title so acquired may not, if allowed to stand, be effectual to divest plaintiff of her title.

Defendant S. claimed to be entitled to a judgment, declaring that plaintiff as devisee was liable for his debt against the testator to the extent of the estate devised, and charging the same upon the lands. *Held*, that as plaintiff was not the sole devisee, as under the statute making devisees liable for the testator's debts (2 R. S. 452, §§ 32, 33, 56) in case of several devisees, they are to be prosecuted jointly, and the debt apportioned among them, and as all the devisees were not parties, such relief could not be granted in this action.

Also *held*, the fact that the other devisee had aliened his land, and was insolvent did not affect plaintiff's rights; that as the court, in enforcing the liability of devisees, proceeds not by virtue of its general jurisdiction, but simply under a special statutory authority, it could not disregard the limitations imposed by the statute.

(Argued November 22, 1883; decided December 4, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 29, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to have certain lands situate in Sullivan county adjudged to be the lands of the plaintiff, and that she be awarded possession thereof; also to restrain the foreclosure of a mortgage thereon, executed by defendant Thompson to defendant Stevens, and to have the same canceled of record.

The father of the plaintiff died in 1869, leaving a will by which he gave "the use, benefit and occupation of" the land in question to his wife so long as she remained his widow. In

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case she should not again marry, he devised the land to her in fee. In case she again married he gave the lands to plaintiff in fee.

The further material facts are stated in the opinion.

T. F. Bush for appellant. The farm devised to plaintiff is chargeable with either the whole or a just proportion of this defendant's claim. (2 R. S. 453, §§ 32, 47, 48, 56, 57; *Selover v. Coe*, 63 N. Y. 438; *Armstrong v. Wing*, 10 Hun, 520.) Where there is a manifest intention of the testator to exempt personal property from the payment of debts, it ceases to be a primary fund for that purpose. (Redf. on Wills, part 2, p. 847; Story's Eq. Jur., §§ 571, 573; *Hoes v. Van Hoesen*, 1 N. Y. 122; *Hawley v. Hawley*, 5 Paige, 448; *Livingston v. Newkirk*, 3 Johns. Ch. 319.) The proceeds of the real estate could be applied in payment of debts only through a proper proceeding to reach real property for that purpose. (Laws of 1837, chap. 460, § 75.) The appellant's claim is not barred by the statute of limitations. (2 R. S. 302, § 52; id. 455, §§ 47, 49; p. 364, § 3; *Elwood v. Diefendorf*, 5 Barb. 398; *Lawrence v. Trustees, etc.*, 2 Denio, 577; *Wood v. Wood*, 26 Barb. 356; Code of Civ. Pro., § 1371; 2 R. S. 109, § 64; *Selover v. Coe*, 63 N. Y. 438.) The proceedings taken upon the petition of the widow under the statute for the sale of infants' estates were void upon the face of the record. The statute provides only for the sale of an estate of which an infant is seized. (*Rogers v. Dill*, 6 Hill, 415; *Baker v. Lorillard*, 4 N. Y. 257; *Jenkins v. Farley*, 73 id. 355; *Battle v. Terry*, 65 id. 294; 2 Redf. on Wills, part 2, p. 594; *Durando v. Durando*, 23 N. Y. 33; *Genet v. City of Brooklyn*, 69 id. 506; *Townsend v. Mayor*, 77 id. 542; *Schrøder v. Guernsey*, 73 id. 430; *Washburns v. Burnham*, 53 id. 132; *Sanders v. Village of Yonkers*, id. 439; *Haywood v. City of Buffalo*, 14 id. 534; *Town of Venice v. Woodruff*, 62 id. 462.)

George W. Weiant for respondent. As to the special

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guardian, the rule is that a trustee cannot be permitted to purchase an interest in property when he has a duty to perform in relation to such property which is inconsistent with the character of purchaser. (*Blake v. B. C. R. R. Co.*, 56 N. Y. 485; *Tiffany v. Clark*, 58 id. 632; *Lytle v. Beveridge*, id. 592; *Fulton v. Whitney*, 66 id. 548; *Hubbell v. Medbury*, 53 id. 98; *Campbell v. Johnston*, 1 Sandf. Ch. 148; *Ward v. Smith*, 3 id. 592; *Lefevre v. Caraway*, 22 Barb. 168; 53 id. 285; *Spellman v. Terry*, 74 N. Y. 448.) A person who takes a mortgage does so subject to equities that exist in favor of the mortgagor, also subject to the like equities in favor of third parties. (*Shafer v. Reilly*, 50 N. Y. 61.) The plaintiff can maintain this action by her guardian *ad litem*. (Code of Civ. Pro., § 468; *Segeldin v. Myer*, 14 Hun, 593.) The liability of a devisee, heir at law, legatee and next of kin for debts of the testator or intestate exists only by statutes. (*Selover v. Coe*, 63 N. Y. 438; 3 R. S. 749, § 27 [5th ed.] as amended by chap. 110, Laws of 1859; *Armstrong v. Wing*, 10 Hun, 520.) Issuing of execution upon a judgment against the executors does not exhaust the remedy against them for personal assets which have come to their hands and been misapplied by them. (*Wambough v. Gates*, 1 How. App. Cases, 247; 11 Paige, 505.) The purpose of the statute is to give specific effect to the principle that personal property shall first be applied to the payment of debts in accordance with the equity rule as to marshaling assets. (*Rogers v. Rogers*, 3 Wend. 503; *Hoes v. Van Hoesen*, 1 N. Y. 120; *Cumberland v. Coddington*, 3 Johns. Ch. 229; *Livingston v. Newkirk*, id. 312; 3 R. S. [5th ed.] 749, § 27; *Stuart v. Kissam*, 11 Barb. 271; *Weller v. Collins*, 3 Barb. Ch. 427; *Gere v. Clark*, 6 Hill, 350; *Messereau v. Ryerss*, 3 N. Y. 201; *Roe v. Sweezy*, 10 Barb. 247; *Hollister v. Hollister*, 10 How. 532; 3 R. S. [5th ed.] 753, §§ 56, 59.) Heirs and devisees must be prosecuted jointly and not separately. (3 R. S. [5th ed.] 751, 752, § 52; *Messereau v. Ryerss*, 3 N. Y. 261; *Wood v. Wood*, id. 356-362; *Cassidy v. Cassidy*, 1 Barb. Ch. 467; *Schermerhorn v. Barhyte*, 9 Paige, 28; *Butts v. Genung*, 5 id. 254; *Armstrong v. Wing*,

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10 Hun, 520.) The debt of defendant Stevens is barred by the statute of limitations. (*Selover v. Coe*, 63 N. Y. 438; *Wiles v. Suydam*, 64 id. 173; 3 R. S. [5th ed.] 747, § 12; *Sharpe v. Freeman*, 45 N. Y. 802; *Lindsay v. Hyatt*, 4 Edw. 97; *Ball v. Miller*, 17 How. 300-308.) Debts of the ancestor are not a lien until charged upon the land by the proper legal proceedings. (*Wilson v. Wilson*, 13 Barb. 252; 3 R. S. [5th ed.] 752, §§ 51, 61.)

ANDREWS, J. Under the will of John P. Dodge, the mother of the plaintiff took a fee in the farm upon which the testator resided at the time of his death, determinable upon her remarriage, and the plaintiff a contingent fee depending upon the happening of that event. The mother having remarried February 6, 1879, and thereby the contingency having happened upon which the fee was to vest in the daughter, the latter thereupon became seized of an absolute estate in the farm, unless her contingent estate under the will was divested by the proceedings instituted in 1870, under the statute for the sale of the real estate of infants, and the sale and conveyance of the farm under the order of the court therein. The defendant Thompson, who was the executor of the will of John P. Dodge, was duly appointed the special guardian of the plaintiff in the proceedings which resulted in a sale of the infant's interest in the farm, to one Julia A. Coulter for the sum of \$7,300. The special guardian executed a conveyance of the infant's interest to the purchaser, who paid a part of the purchase-money at the time, and executed a mortgage for \$5,000, on the farm, to Thompson as special guardian, to secure the part remaining unpaid. The mother of the plaintiff, concurrently with the conveyance by Thompson, also conveyed to Mrs. Coulter, her interest in the farm. The consideration for her conveyance does not clearly appear, but it is inferable that \$7,300 was the whole consideration paid for the farm, and that the mother consented that the mortgage of \$5,000 should be taken by the special guardian for the benefit of the plaintiff. In 1878, Thompson, as special guardian, commenced an action

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to foreclose the Coulter mortgage, and the farm was sold by a referee under the decree in the foreclosure action, February 3, 1879, and was bid in by Thompson in his own name, for the sum of \$5,000, and the farm was conveyed to him by the referee pursuant to the sale. Thompson paid no part of the purchase-money. The referee accepted his receipt as special guardian for the amount bid, in lieu of actual payment in money. Intermediate the sale and the delivery of the deed, Thompson, in his individual character and as an executor of the will of John P. Dodge, upon his own motion and without the direction of the court, executed to the defendant Stevens a mortgage on the land for \$2,766.14, to secure a debt due to the latter from the estate of John P. Dodge, and for which Stevens had recovered a judgment against the executor. Stevens subsequently commenced an action to foreclose his mortgage, and pending the foreclosure, this action was brought against Thompson and Stevens, to compel the former to convey to the plaintiff the title acquired by him on the foreclosure of the Coulter mortgage, and for the cancellation of the Stevens mortgage.

It is conceded by the counsel for the appellant Stevens, that the purchase by the defendant Thompson, on the foreclosure of the mortgage held by him as special guardian, was in violation of the settled principle in equity that no person placed in a situation of trust in reference to a sale can purchase on his own account. (*Torrey v. Bank of Orleans*, 9 Paige, 649; *S. C.*, 7 Hill, 260.) It is also conceded that Thompson, neither in his own right nor as executor of the testator, John P. Dodge, had authority to mortgage the land to Stevens to secure the debt of the testator. But it is claimed that the invalidity both of Thompson's title and of the mortgage to Stevens are disclosed by the record, and that the plaintiff does not require the aid of equity to protect her rights, and cannot, therefore, maintain this action.

It is doubtless true that an examination of the chain of title would apprise a purchaser of the fact that Thompson's title was derived under a foreclosure of a mortgage held by him as

special guardian, and the infirmity of his title would affect the title of his grantees or mortgagees, who would be chargeable with notice, by the record, of the disability of Thompson to deal with the property to the prejudice of the plaintiffs. But a purchase by a trustee, for himself, of trust property, in respect of which he has a duty to perform inconsistent with the character of purchaser, is voidable at the election of the *cestui que trust*, and not absolutely void. The *cestui que trust* may affirm the transaction and treat the trustee as purchaser, or he may disaffirm the purchase; and in case of real estate, if the title has become vested in the trustee by a conveyance, may compel the trustee to convey to him, or in trust for him, as the case may require. This is the jurisdiction which was invoked in this case as against the defendant Thompson, and it is no answer to the relief sought against him that the defect in his title would be disclosed by an examination of the record. The plaintiff's mortgage was extinguished by the foreclosure, and the court, as incident to its jurisdiction over trusts, had ample authority to grant the relief demanded. (*Ward v. Smith*, 3 Sandf. Ch. 592.) It was also proper for the court, for the purpose of affording complete relief, and to free the title from embarrassment, to set aside the mortgage to Stevens, who took it with full notice of the rights of the plaintiff.

It is claimed, however, that the action will not lie, for the further reason that the sale to Mrs. Coulter, under the proceedings for the sale of the real estate of the infant plaintiff, was ineffectual to divest her contingent estate under the will of her father. This contention is based upon the ground that the statute only provides for the sale of an estate of which an infant is seized, and that the court, in directing the sale of the plaintiff's contingent estate, acted without jurisdiction. (*Jenkins v. Fahey*, 73 N. Y. 355.) But, assuming that the court had no authority to direct a sale of the plaintiff's contingent estate, and that, upon the remarriage of her mother, she took the fee in the land, unaffected by the sale, we are nevertheless of opinion that this action can be maintained. The court, in directing a sale of the interest of the plaintiff,

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necessarily adjudged that the case was within the statute, and the conveyance to Thompson purported to convey the entire title. The Coulter mortgage unquestionably bound the interest of the plaintiff's mother in the land, and her remarriage had not taken place at the time of the sale on the foreclosure. If the conveyance to the defendant Thompson is allowed to stand, it is plain that it will embarrass the plaintiff's title, although the court might decide, on a re-examination of the question, that the statute for the sale of the real estate of infants does not authorize the sale of a contingent interest. The action is brought to redress a violation of trust, and the defendants ought not to be permitted to defeat it, upon the suggestion that the apparent title acquired by such violation may not, after all, if allowed to stand, be effectual to divest the plaintiff of her title to the property.

The remaining question arises upon the claim of the appellant Stevens, that he is entitled in this action to a judgment, declaring the plaintiff liable, as devisee of her father, for his debt against the testator, John P. Dodge, to the extent of the estate devised to her, and charging the same upon the farm in question. The judgment obtained by Stevens against the executor Thompson did not bind the land devised to the plaintiffs. (2 R. S. 449, § 12.) But the statutes make heirs or devisees liable for the debts of the testator to the extent of their interest in the estate descended or devised, upon certain conditions stated. (2 R. S. 452, §§ 32, 33, 56.) It also prescribes the proceedings to be taken to enforce the remedy given, and in case of several devisees it provides for apportioning the debt among them according to their respective interests (§ 52), and directs that they should be prosecuted jointly to enforce their liability (§ 60).

The plaintiff was not the sole devisee under the will. It is an unanswerable objection to granting the relief sought by the appellant Stevens in this action, that all the devisees are not parties, and this objection was raised by the pleadings. The statute is imperative, and the remedy which depends upon the statute must be pursued in the way it points out. The fact that the devisee Michael J. Dodge has aliened the land devised

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to him, and that he is insolvent, might furnish a reason for dispensing with his being made a party, if the court, in enforcing the liability of devisees, proceeds in virtue of its general jurisdiction, but acting as it does in such cases under a special statutory authority, it cannot disregard a limitation imposed by the statute, which creates the remedy. (*Schermerhorn v. Barhydt*, 9 Paige, 28; *Cassidy v. Cassidy*, 1 Barb. Ch. 467; *Gere v. Clarke*, 6 Hill, 350.) The decisions recognize the necessity of joining all the devisees in an action under the statute. (*Wambaugh v. Gates*, 11 Paige, 513; *S. C.*, How. Ct. App. Cas. 247; *Parsons v. Bowne*, 7 Paige, 354.) The non-joinder of the other devisees in this case being a conclusive answer to the claim of the defendant Stevens to charge in this action the plaintiff or the land devised to her, with his debt against the testator, it is unnecessary to consider whether the other conditions, upon which the liability of a devisee for the debts of a testator depend, were met by the evidence.

We think the judgment should be affirmed.

All concur.

Judgment affirmed.

ALONZO CLARK, Respondent, v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

The provision of the Code of Civil Procedure (Subd. 3, § 414), exempting from the operation of the chapter (4), limiting the time for the commencement of actions, a case where a person was entitled to commence an action when the Code took effect, and declaring that in such a case "the provisions of law applicable thereto immediately before this act takes effect continue to be so applicable, notwithstanding the repeal thereof," does not refer simply to statutory provisions, but within the meaning of said exception a rule or doctrine established by judicial decision is a "provision of law" equally with one enacted by the legislature.

Accordingly held, where plaintiff was entitled to, and had commenced his action before the Code went into effect, that the provision of said Code (§ 890), making the statute of limitations of the place of residence of a non-resident defendant available as a defense in certain cases, did not

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apply; but that the case was governed by the rule in force when the Code went into effect, i. e., that the statute of limitations of a foreign State constituted no defense to an action brought here.

(Argued November 21, 1883; decided December 11, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 3, 1882, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to recover guaranteed dividends upon certain shares of stock of the Michigan Southern and Northern Indiana Railroad Company, which was consolidated with others in the organization of the defendant, and whose obligations defendant assumed and agreed to pay.

The material facts are stated in the opinion.

Edward S. Rapallo for appellant. Section 390 of the Code of Civil Procedure is applicable to a corporation. (*Olcutt v. Tioga R. R. Co.*, 20 N. Y. 210.) Where a statute of limitations has once begun to run in favor of a defendant, the fact that the liability devolves upon a successor or representative does not set the statute running anew from the time of such change. (*Reynolds v. Collins*, 3 Hill, 36; *Christopher v. Garr*, 6 N. Y. 61.) Section 390 was the law applicable to this case. (*Acker v. Acker*, 81 N. Y. 143.)

Lucien Birdseye for respondent. If defendant intended to rely upon the statutes of Michigan and Illinois, he should have pleaded them by the titles and provisions. (*Nash v. Tupper*, 1 Caines, 402.) When this action was brought in August, 1875, no statute of this State authorized the obtaining of the benefit in the courts of this State of a foreign statute of limitations. (*Esselstyn v. Weeks*, 2 Kern. 639; Code of 1848, § 90; Code of Proc., § 110; Code of Civil Procedure, subd. 3, § 414.) Aside from the provisions of section 390 of the Code of Civil Procedure the defense of the foreign statute of limitations was wholly unavailable in this State, whether pleaded or not. (*Nash v. Tupper*, 1 Caines, 402; *Ruggles v. Keeler*, 3 Johns. 263;

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Decouche v. Santlier, 3 Johns. Ch. 190; *Hubbell v. Cowdry*, 5 Johns. 132; *Bissell v. Hall*, 11 id. 168; *Lincoln v. Battell*, 6 Wend. 475; *Carpenter v. Wells*, 21 Barb. 593; *Toulandon v. Tachenmeyer*, 6 Abb. Pr. [N.S.] 215; *Gans v. Frank*, 36 Barb. 320; *Thompson v. Tioga R. R. Co.*, 36 id. 79; *Power v. Hathaway*, 43 id. 214; *Hall v. Robbins*, 4 Lans. 463; *Carpenter v. Minturn*, 6 id. 56; *Olcott v. Tioga R. R. Co.*, 25 N. Y. 210, 224; *Rathbone v. N. C. R. R. Co.*, 50 id. 656; *Miller v. Brenham*, 68 id. 83; *Boardman v. L. S. & M. S. R'y Co.*, 84 id. 157, 184-5.)

FINCH, J. It is conceded that all the questions in this case have been disposed of by previous decisions, (*Boardman v. Lake Shore & M. S. R'y Co.*, 84 N. Y. 157; *Prouty v. Lake Shore & M. S. R. R. Co.*, 85 id. 272), except the defense of the statute of limitations. The defendant company, which is a corporation in this State, and is sued here by a non-resident plaintiff, and which is the successor of the original debtor, whose corporate origin was under the laws of Michigan and Illinois, proved upon the trial the statutes of limitation of those States, and claimed that they constituted a bar to the recovery. That contention rests upon the construction and effect of section 390 of the Code of Civil Procedure, read in connection with section 414; for it is agreed on both sides that, before September, 1877, when the Code took effect, the statute of limitations of a foreign State constituted no defense to an action brought here. (*Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; *Miller v. Brenham*, 68 id. 83.) Section 390 has changed that rule to some extent, and the argument at once comes to the point, whether, under section 414, that change operates upon the cause of action in the case before us. The suit was brought in 1875, or about two years before the new Code took effect. Section 414 begins with a broad enactment that the provisions of chapter 4 "apply, and constitute the only rules of limitation applicable to a civil action, or special proceeding, except in the following cases." Then four exceptions are specified, the third of which only is ma-

terial to our inquiry, and is in substance, "a case * * * in which a person is entitled, when this act takes effect, to commence an action * * * where he commences * * * the same before the expiration of two years after this act takes effect;" in which case "the *provisions of law* applicable thereto, immediately before this act takes effect, continue to be so applicable, notwithstanding the *repeal thereof*." The learned counsel for the appellant does not deny that the plaintiff comes within the description of a person entitled, when the Code took effect, to bring this action, although at that date it was already brought; but the result sought is deduced from the last clause of section 414 as giving character and construction to the language which precedes it. It is said that a "repeal" indicates a statute annulled, and not a judicial decision abrogated and reversed; and so the previously existing "provisions of law," spoken of as remaining applicable, must be those and those only which are embodied in former statutes of limitation repealed by the Code. It is doubtless true, that to speak of the "repeal" of a judicial doctrine is an awkward and unusual form of expression, and due probably to the fact that the framer of the section had mainly in his mind the repealed statutes of limitation; and yet the entire scope of the exception seems to us clearly intended to make applicable in the given case the previous "provisions of law" precisely as they stood before the Code, whether formulated in statutes, or resting in judicial decisions, and notwithstanding their repeal or abrogation by the new and substituted law. The purpose appears to have been to leave the plaintiff in the excepted case, precisely with the same rights and remedies he would have had if the Code of 1877 had never been enacted. The phrase "provisions of law" is a broad and general one. It cannot justly be confined to statutes, or legislative enactments. A rule or doctrine established by judicial decision is a "provision of law" equally with one enacted by the legislature. As such it is retained, and made operative in the excepted case. The use of the word "repealed" cannot narrow the phrase, "provisions of law" to such only as are statutory, in the face of an evi-

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dent legislative intent to leave the parties in the excepted cases exactly in the same situation as if the Code of 1877 had never been enacted. This conclusion leads to an affirmance of the judgment, without considering the other answers to the statute of limitations presented on the argument.

The order should be affirmed and judgment absolute rendered against defendant, with costs.

All concur.

Order affirmed.

THE UNION DIME SAVINGS INSTITUTION OF THE CITY OF NEW YORK, Appellant, v. OSEE W. WILMOT et al., Respondents.

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It is the right of a person, in order that he may obtain more than the lawful rate of interest for his money, to require securities which have had a valid inception, and which he may lawfully purchase at a discount greater than such rate, and when securities appearing on their face to be valid and subsisting obligations are produced to him, and he purchases them upon the faith of representations on the part of the parties thereto that they are what they appear, and that there is no defense, the parties are estopped from claiming that they had in fact no inception until thus purchased and so that they are usurious.

The estoppel also binds the privies in estate of the parties, and when the securities so purchased are a bond and mortgage, a subsequent lienor, whether by mortgage or mechanic's lien, may not interpose the defense of usury, as such lienor can have no better right than the owner or borrower had at the time the lien was created.

It seems that under the law of this State a subsequent lienholder, by mortgage, judgment or mechanic's lien, may avail himself of the defense of usury against a prior mortgage.

(Argued November 23, 1883; decided December 11, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 5, 1881, which affirmed a judgment dismissing the complaint as to defendants, Wilmot and Koch, entered upon a decision of the court on trial at Special Term.

This action was to foreclose a mortgage. The defense was usury. The material facts are stated in the opinion.

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William H. Arnoux for appellant. A subsequent incumbrancer is not entitled as such to interpose the plea of usury against a prior mortgagee. (*De Wolf v. Johnson*, 10 Wheat. 367, 393; *Loomis v. Eaton*, 32 Conn. 550; *Hollingsworth v. Twichard*, 10 Iowa, 385; *Powell v. Hunt*, 11 id. 430; *Farmers and Mechanics' Bank v. Kimmel*, 1 Mich. 64; *Ready v. Huebner*, 46 Wis. 792; 32 Am. Rep. 749; *Pritchett v. Mitchell*, 17 Kans. 356; 24 Am. Rep. 287; *Carmichael v. Bodfish*, 32 Iowa, 418; *Bensley v. Homier*, 42 Wis. 631; *Baskins v. Calhoun*, 45 Ala. 582; *Ransom v. Hays*, 39 Mo. 445; *Boardman v. Roe*, 13 Mass. 104; *Graham v. Moore*, 7 B. Monr. 53; *Wright v. Bindy*, 11 Ind. 398; *Lamoille County Bank v. Bingham*, 50 Vt. 105; *Fielder v. Varner*, 45 Ala. 429; *Adams v. Robertson*, 37 Ill. 45; *Campbell v. Johnson*, 4 Dana [Ky.], 177; *Cain v. Girnon*, 36 Ala. 168; *Miners' Trust Company v. Rosebury*, 2 L. & Eq. [Penna.] 478; *Shedabaker v. Marquardt*, 55 Ind. 341; *Ladd v. Wiggins*, 35 N. H. 421; *Huston v. Stringham*, 21 Iowa, 36; *McCallister v. Jerman*, 32 Miss. 42; *Campbell v. Sloan*, 12 P. F. Smith, 481, approved in *Macungie Savings Bank v. Hollenstein*, 7 Weekly Notes of Cases, 320; Tyler on Usury, 403, 417, 409; *Wright v. Clapp*, 28 Hun, 7; 15 Week. Dig. 424; *Pratt v. Adams*, 7 Paige, 615; *Post v. Dart*, 8 id. 639; *Cole v. Savage*, 10 id. 583; *Shufelt v. Shufelt*, 9 id. 137; *Hartley v. Harrison*, 24 N. Y. 170; *Mechanics' Bank v. Edwards*, 1 Barb. 271; 2 id. 545; 6 N. Y. Leg. Obs. 75; *Greer v. Morse*, 4 Barb. 332; *Morris v. Floyd*, 5 id. 130; *Sands v. Church*, 6 N. Y. 347; *Boughton v. Smith*, 26 Barb. 635; *Weyburn v. White*, 22 id. 82; *Schermerhorn v. Tallman*, 14 N. Y. 94, 127; *Knickerbocker Life Ins. Co. v. Nelson*, 78 id. 154; *Thompson v. Van Vechten*, 27 id. 568; 5 Abb. Pr. 458; 6 Bosw. 373; *Billington v. Wagner*, 33 id. 31; *Williams v. Tilt*, 36 id. 319; *Nat. B'k of Gloversville v. Place*, 15 Hun, 564; *Ohio and Miss. R. R. v. Kasson*, 37 N. Y. 218; *Allerton v. Bender*, 49 id. 373, 377; *Merchants' Exchange Nat. B'k v. Com. Warehouse Co.*, id. 635, 642; *Wheelock v. Lee*, 64 id. 242; *Equitable Life Ass. Soc. v. Cuyler*, 75 id. 511,

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515; *Bissell v. Kellogg*, 65 id. 432; *Nat. B'k of Auburn v. Lewis*, 75 id. 576; *Williams v. Gillies*, id. 197; *Knickerbocker Life Ins. Co. v. Nelson*, 78 id. 137; *Curtis v. Leavitt*, 15 id. 274; *Williams v. Birch*, 2 Tr. App. 133, 136; *Buckingham v. Corning*, 90 N. Y. 525; *Cummings v. Wise*, 6 N. J. Eq. 73; *Banks v. McClellan*, 24 Md. 62; *Cole v. Bausemer*, 26 Ind. 94; *Union Bank v. Bell*, 14 Ohio St. 200.) A mortgage is only a lien not an interest in land. (*Hubbell v. Moulson*, 53 N. Y. 225, 227; *Kortright v. Cady*, 21 id. 343; *Stoddard v. Hart*, 23 id. 569; *Runyan v. Mersereau*, 11 Johns. 527; *Jackson v. Craft*, 18 id. 110; *Jackson v. Bronson*, 19 id. 325.) The lien against Sanford could not embrace more than Sanford's interest. (*Muldoon v. Pitt*, 54 N. Y. 69.) Where a debtor made a general assignment, directing the payment of a usurious debt, neither the assignee nor any creditor could attach such debt. (*Chapin v. Thompson*, 89 N. Y. 270.) At the very least the court would compel these defendants to do equity before giving them equity, and in such a case as this equity demands the payment of the debt. (*Buckingham v. Corning*, 91 N. Y. 525.)

A. J. Vanderpoel for Osee W. Wilmot, respondent. The answer of the defendant Wilmot not only sets up the defense of usury, but distinctly and specifically sets up a counter-claim, and specifies it as such, and demands affirmative relief, and that counter-claim stands confessed as true in fact for want of a reply. (Code of Civil Procedure, § 509; *Genia v. Keah*, 66 Barb. 245; *Adams v. Roberts*, 62 How. Pr. 253.) Wilmot, being a subsequent incumbrancer, could interpose the defense of usury to the plaintiff's mortgage. (*Bergen v. Carman*, 79 N. Y. 151, 152; *Halstead v. Halstead*, 55 id. 445; *Mut. L. Ins. Co. v. Bowen*, 47 Barb. 662; *Bergen v. Snediker*, 8 Abb. N. C. [decided in Ct. of Appeals, Dec. 1878]; *Berdan v. Sedgwick*, 40 Barb. 362; affirmed, 44 N. Y. 626; *Dix v. Van Wyck*, 2 Hill, 522; *Morris v. Floyd*, 5 Barb. 134; *Post v. Dart*, 8 Paige, 639; *Shufelt v. Shufelt*, 9 id. 137; *Muny v. Barney*, 34 Barb. 336; *Hartley v. Harrison*, 24 N. Y. 170; *Sands v.*

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Church, 2 Seld. 347; *Peutren v. Mitchell*, 22 Am. Rep. 287, note; *Cole v. Savage*, 10 Paige, 583; 2 Jones on Mortgages, 419; *Thompson v. Van Vechten*, 27 N. Y. 568, 585; *Mason v. Lord*, 40 id. 488; *Schuppe v. Corning*, 5 Denio, 236; *Carew v. Kelly*, 59 Barb. 249; *Knickerbocker L. Ins. Co. v. Nelson*, 78 N. Y. 137; *Mut. L. Ins. Co. v. Bowen*, 47 Barb. 622, 623; *Livingston v. Mildrum*, 19 N. Y. 442; *Halstead v. Halstead*, 55 id. 442, 445.) In order to entitle the defendant Wilmot to the relief sought by him, it was not necessary that he should have paid, or offered to pay, the principal, or any part of the sum loaned on the plaintiff's mortgage. (3 R. S. [5th ed.] 73, § 8; *Knickerbocker L. Ins. Co. v. Nelson*, 78 N. Y. 152.) One who asserts a lien upon mortgaged property is not a stranger within the meaning of the rule that the defense of usury is a personal one. (*Carew v. Kelly*, 59 Barb. 239; *Dix v. Van Wyck*, 2 Hill, 522; *Mason v. Dixon*, 40 N. Y. 448; *Thompson v. Van Vechten*, 27 id. 568.)

Joseph C. Jackson for George W. Koch, respondent. The lien of Koch applies to all of the property of plaintiff. (*Livingston v. Mildrum*, 19 N. Y. 440; *Moran v. Chase*, 52 id. 346; Laws of 1863, chap. 500, § 11; 2 R. S., §§ 42, 43, 63.) The decree in *Wilmot v. Clark*, put in evidence, established Koch's priority to defendant Wilmot's mortgage. (Laws of 1863, chap. 500, § 1.) The plea that the mortgage in suit is usurious and void is valid. (*Mut. L. Ins. Co. of N. Y. v. Bowen*, 47 Barb. 622; *Berdan v. Sedgwick*, 40 id. 362; *Meehan v. Williams*, 36 How. 73; *S. C.*, 2 Daly, 357; *Post v. Dart*, 8 Paige, 639; *Morris v. Floyd*, 5 Barb. 134; *Dix v. Van Wyck*, 2 Hill, 522.) The mortgage is utterly void against all the parties having liens on the property. (*Schræppel v. Corning*, 5 Denio, 236.) It cannot defeat the rights of third parties. (*Thomas v. Fish*, 9 Paige, 478; *Anderson v. Rappelye*, id. 483.) The statute makes an usurious contract absolutely void in its inception; and so it must ever remain. (1 Edm. R. S. 725, § 38; 4 id. 400; *Thompson v. Van Vechten*,

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27 N. Y. 568; *Wheeler v. Close*, 45 id. 303, 311, 314, 315; *Knick. L. Ins. Co. v. Nelson*, 13 Hun, 321; affirmed, 78 N. Y. 137; *Bergen v. Carman*, 79 id. 151.) The statute renders the mortgage void. (*Thomas v. Fish*, 9 Paige, 478; *Anderson v. Rappelye*, id. 483.) The rights of lienors are protected "according to justice and right, by adopting equity jurisprudence as a basis of this system." (Gurnsey's *Mechanics' Lien Laws*, p. 30, § 35; p. 33, § 68; *Blauvelt v. Wordsworth*, 31 N. Y. 287.) An equitable lien may be acquired upon general principles for repairs, benefits, etc., in certain cases. (Gurnsey's *Mechanics' Lien Laws*, p. 36, § 76; p. 37, § 79; 2 Story's *Eq. Jur.*, §§ 799, 1234, 1239.) After the existence of a materialman's lien is brought to the notice of the court, the court has power, and it will exercise its right to protect that lien under all circumstances, even to computing its amount, and ordering a sale of the property incumbered, in order to discharge the lien. (*Livingston v. Mildrum*, 16 Abb. Pr. 371; *S. C.*, 19 N. Y. 443; *Freeman v. Arment*, 5 N. Y. Leg. Obs. 391; *Moran v. Chase*, 52 N. Y. 346; *Snyder v. Stafford*, 11 Paige, 71; *Beekman v. Gibbs*, 8 id. 510; *Bergen v. Snediker*, 8 Abb. N. C. 57.)

EARL, J. In 1872, one Rowe conveyed certain real estate, situated in the city of New York, to Thomas L. Sanford, who executed to Rowe a mortgage thereon, to secure a portion of the purchase-money. In 1873, Rowe foreclosed that mortgage making Sanford a party to the action, and upon the foreclosure sale Francis J. Clark became the purchaser, and received a deed; and on the 24th day of April, 1874, Sanford quit-claimed to Clark all his right, title and interest in the real estate. On the 9th day of May, Clark mortgaged the real estate to Everett Clapp, to secure the sum of \$22,000, and on the morning of the 13th day of May, Clapp assigned the mortgage to the plaintiff. Thereafter, on the same day Clark executed another mortgage to Clapp to secure \$10,000, which was subsequently assigned to the respondent Wilnot.

After the execution of these mortgages, the defendant Koch

furnished material for the construction of a house upon the real estate, and filed a mechanic's lien thereon, to secure the amount due him. In 1878, the plaintiff commenced an action to foreclose its mortgage and Wilmot and Koch, having been made parties defendant, interposed answers in which they allege their respective liens, and set up the defense of usury against plaintiff's mortgage.

The following facts appear from the undisputed evidence. The mortgage was assigned to the plaintiff at a discount from its face of seven per cent. An application was made to it for a loan, and it refused to loan money, but offered to purchase a purchase-money mortgage if one could be made and brought to it. Subsequently this mortgage reciting that it was given for purchase-money was presented to it, and it was represented at the time, orally, to be a purchase-money mortgage. At the time of the assignment Clapp represented that it was a purchase-money mortgage, and in the instrument of assignment covenanted and agreed that it was a valid subsisting lien upon the premises described, that there was unpaid the full sum of \$22,000 and interest, and that there was no defense, offset or, counter-claim thereto. At the same time Clark, the mortgagor, executed an instrument under seal, whereby he covenanted and agreed with the plaintiff that the mortgage was a valid and subsisting lien, that there was unpaid the full sum of \$22,000, and that there was no defense, offset or counter-claim thereto, and that the certificate was procured from him without any fraud or misrepresentation whatever. After the execution of the two mortgages, Clark conveyed the real estate to the defendant Sanford, subject, nevertheless, to the mortgages; and Sanford is made a defendant to this action, as the owner of the real estate, and he also has interposed the defense of usury to plaintiff's mortgage.

The court below held that Sanford could not maintain the defense of usury interposed by him, because the premises had been deeded to him subject to the mortgage. Clark and Clapp, who were also made parties defendant interposed no defense. But the court held that Wilmot and Koch, holding

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subsequent liens upon the real estate, could maintain the defense of usury; and that the complaint as to them should be dismissed.

We think the learned court erred in dismissing the complaint as to the two defendants.

The plaintiff had the right to refuse to loan the money in this case at seven per cent, then the legal rate, and to require that a valid purchase-money mortgage should be made which it could purchase at any rate of discount which could be agreed on. If this mortgage had actually been a purchase-money mortgage then there would not be a particle of evidence that it was tainted with usury. The evidence would simply show that the bank refused to loan money upon a mortgage to be made to it; that it required that a purchase-money mortgage should be made so that it could purchase the same at a discount, and thus secure a larger rate of interest than seven per cent. That such a transaction would have been valid is settled by the cases of *Smith v. Cross* (90 N. Y. 549) and *Dunham v. Cudlipp* (recently decided in this court*).

But here all the parties engaged in effecting the negotiation with the plaintiff, to-wit, Clark, the mortgagor, and Clapp, the mortgagee, with the knowledge and consent of Sanford, represented that this was a purchase-money mortgage; that it was a valid mortgage, and that there was no defense thereto. And there is not a particle of evidence that the plaintiff did not believe these representations, and rely upon them. All the evidence shows that its agents intended to take a purchase-money mortgage; that they did not mean to take any other, and that they supposed they were getting a valid purchase-money mortgage. There is no evidence whatever that the transaction took the form it did as a cover for usury. In one sense it took this form for the purpose of escaping usury. But the parties had a perfect right to deal with each other with the usury laws before their eyes, and to so shape the transaction as to avoid the condemnation of those laws. It is always the right of one having money to loan or to invest to require,

* *Ante*, p. 129.

in order that he may obtain more than six per cent, that securities, having a valid inception and free from the taint of usury, shall be presented to him before he will advance money; and it was so settled in the two cases referred to.

It is clear, therefore, that both Clark and Clapp are estopped from denying that the plaintiff's mortgage is valid, and thus are precluded from alleging the defense of usury against the same. And inasmuch as they were estopped, Wilmot, who also holds under them, is bound by the same estoppel. Estoppels bind parties and their privies in estate and blood (*Coke Litt.* 352 a; *Campbell v. Hall*, 16 N. Y. 575; *Wood v. Seely*, 32 id. 105, 116); and it was so held in the case of *Smith v. Cross*, above referred to.

There was some evidence tending to show that this mortgage was given to Clapp for value. But whether it was or not is a matter of no consequence if the plaintiff believed, upon representations made by Clark and Clapp, that it was so given, and was induced by such belief to take the mortgage, because in that case, as we have seen, they were both estopped.

Koch is also estopped from assailing plaintiff's mortgage on the ground of usury. His lien was for material furnished to Sanford, and Sanford could not avail himself of the defense of usury. Having taken the conveyance subject to the mortgage, he was in no condition to allege usury against it; and thus all the parties under whom Koch claimed, Clark, Clapp and Sanford, were precluded, at the time he acquired his lien, from alleging usury against the plaintiff; and there is no rule of law that gives him a better right than they could have.

I am inclined to think that the law in this State authorizes a subsequent lien-holder, by mortgage, or judgment, or mechanic's lien, to avail himself of the defense of usury against a prior mortgage. (*Berdan v. Sedgwick*, 40 Barb. 359; affirmed in 44 N. Y. 626; *Dix v. Van Wyck*, 2 Hill, 522; *Morris v. Floyd*, 5 Barb. 134; *Post v. Dart*, 8 Paige, 639; *Shufelt v. Shufelt*, 9 id. 137; *Cole v. Savage*, 10 id. 583; *Thompson v. Van Vechten*, 27 N. Y. 585; *Mason v. Lord*, 40 id. 476.) But a subsequent lien-holder can have no better

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right to interpose the defense of usury than the owner or borrower had at the time the lien was created. An owner or borrower may be estopped from setting up the usury, or he may in some legal way waive the defense, or, by agreement, purge the transaction of usury; and whoever thereafter purchases from him the real estate upon which the usurious security is a mortgage, or obtains a lien thereon from or under him, takes his position, and can have no better right to allege the usury than he had.

Our conclusion, therefore, is that in any aspect of this case, as the facts plainly appear, the defendants Wilmot and Koch must fail in their defense.

The judgment should, therefore, be reversed as to these two defendants, and a new trial granted, costs to abide event.

All concur.

Judgment, so far as appealed from, reversed.

94	229
106	897

ALMIRA B. COLEMAN, Respondent, v. THE MANHATTAN BEACH
IMPROVEMENT COMPANY (Limited) et al., Appellants.

While it is essential that premises upon which a grant is to operate must be so described therein that they can be identified, it is not necessary that they should be described by boundaries, courses or distances, or by reference to monuments.

Where words of general description are used, oral evidence may be resorted to to ascertain the particular subject-matter to which they apply, and if, with the aid of such evidence, the premises can be located, the grant will not fail.

The provision of the Revised Statutes, declaring a grant of land void if at the time of delivery thereof the land shall be in the actual possession of one claiming under a title adverse to that of the grantor, does not apply to a deed from an assignee in bankruptcy, made in pursuance of an order of the bankruptcy court.

A deed described the granted premises as "Pelican beach, near Barren island." In an action of ejectment it appeared that the name "Pelican beach" was originally applied to the salt meadows, marsh and beach on the westerly end of Barren island. An inlet subsequently opened across said beach, separating a greater portion thereof from the island. The

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title of the grantees to the beach was undisputed. *Held*, that the deed was not void for uncertainty, but related to, and conveyed that portion of Pelican beach cut off from the island by the inlet.

The deed was executed in 1853, plaintiff claimed title under a deed executed to him in 1880, by an assignee in bankruptcy of one who took title from the original grantee. The assignee executed the deed under an order of the bankruptcy court, made upon petition of the bankrupt, showing that plaintiff purchased of him, and paid for the lands in question, together with other lands in 1856, and that by mistake they were omitted from the deed; the assignee's deed recited that it was made to correct such mistake. At the time of the delivery of the assignee's deed, defendant was in possession, claiming under a deed executed in 1877 by the grantors in the deed of 1855. *Held*, that the bankruptcy court had power to give the relief granted by its order, in the absence of any objection by the parties in interest; and that the deed was not void as champertous.

(Argued November 26, 1883; decided December 11, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 13, 1882, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Mem. of decision below, 26 Hun, 525.)

This was an action of ejectment.

Both parties claimed title under deeds from the heirs of George Lott, who it was conceded died seized of the premises in question. Plaintiff claimed under a deed executed by said heirs to Cornelius Fornet, dated September 11, 1855, conveying "all their right, title and interest in and to Pelican beach, near Barren island, in the town of Flat-heads." Fornet conveyed by quit-claim deed, containing the same description, in 1855, to Abraham B. Coleman. The deed also conveyed other lands. In July, 1856, said Coleman executed a conveyance to plaintiff, which described the other lands deeded by Fornet, and described the premises conveyed as being the same premises conveyed to Coleman by Fornet, but Pelican beach was not mentioned in the deed. On December 13, 1880, John H. Platt, as assignee in bankruptcy of said Coleman, in pursuance of an order in bankruptcy of the District Court of the United States for the southern district of

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New York, executed to plaintiff a deed containing the same description. The order was granted upon petition of the bankrupt, showing that the lands were purchased and paid for by plaintiff, but were by mistake omitted in the deed of 1856. The order and the assignee's deed recited that they were made for the purpose of correcting such mistake. The deed under which defendant claims was executed by the heirs of George Lott to John L. Bergen, July 3, 1877.

Further facts appear in the opinion.

Winchester Britton for appellants. As defendants were in actual possession of the *locus in quo*, claiming under a title adverse to that of the grantor at the time of the conveyance by the assignee, it was void. (2 R. S. [6th ed.] 1120; 1 R. S. 739.) This was not a judicial sale, such a sale must be under a *bona fide* judgment or decree of a court having competent jurisdiction. (*Hoyt v Thompson, Exr.*, 1 Seld. 346; *Williamson v. Berry*, 8 How. [U. S.] 495.) Nor was this conveyance in pursuance of any previous valid contract to convey. (4 Kent's Com. [7th ed.] 448, note, 488; 4 U. S. Dig., p. 584, No. 2,624.) The lands in possession of the defendants are in the town of Gravesend. (1 R. S. [6th ed.] 205; *Denton v. Jackson*, 2 Johns. Ch. 320; *North Hempstead v. Hemstead*, 2 Wend. 109.)

Henry G. Atwater for respondent. In construing descriptions in deeds the utmost liberality is allowed, and the intent of the parties will be effectuated if it can by any possibility be gathered from the deed. (*Jackson v. Delancy*, 11 Johns. 365; *Loomis v. Jackson*, 19 id. 449; *Rollin v. Pickett*, 2 Hill, 552; *Jackson v. Marsh*, 6 Cow. 281; *Mason v. White*, 11 Barb. 173; *Peck v. Mellams*, 10 N. Y. 532.) The words of conveyance used are sufficient to convey a fee. A quit-claim deed operates as a conveyance. (*Jackson v. Alexander*, 3 Johns. 484; *Jackson v. Fish*, 10 id. 456; *Jackson v. Root*, 18 id. 60, 78; *Lynch v. Livingston*, 6 N. Y. 422.) The deed from John H. Platt, as assignee in bankruptcy of Abraham B. Coleman, is a

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valid deed and well describes and conveys the premises in question. (*Stevens v. Houser*, 39 N. Y. 302, 303.)

ANDREWS, J. The deed of September 11, 1855, from the heirs of George Lott to Cornelius Fornet, under which the plaintiff claims title to the premises in controversy, describes the granted premises as "Pelican Beach, near Barren island, in the town of Flatlands." It is claimed that this description is so vague, uncertain and indefinite, that the premises cannot be located, and that for this reason no title was acquired by the deed which will support an action of ejectment. It is doubtless true that the premises upon which a grant is to operate, must be described in the grant so that they can be identified. But it is not necessary that they should be described by boundaries, courses or distances, or by reference to monuments. Words of general description, such as the estate of Blackacre, or the estate purchased of A., or the farm in the occupation of B., are sufficient. Nothing passes by a deed except what is described in it, whatever the intention of the parties may have been, but when words of general description are used, oral evidence is admissible to ascertain the particular subject-matter to which they apply, without infringing upon the rule which prohibits parol evidence to add to or contradict the language of written instruments. The object of oral evidence in such cases is to ascertain the intention of the parties as expressed in the writing, and not to make the deed operate upon land not embraced in the descriptive words. (*Doe v. Holtom*, 4 Ad. & El. 76; *Sanford v. Raikes*, 1 Mer. 653.) The description "Pelican Beach, near Barren island," in the deed in question, is perfectly intelligible, and obviously refers to lands known as Pelican Beach, and if premises owned by the grantors at the date of the deed can be found answering this description, it is certain that they are the premises intended. The deed, therefore, was not subject to the objection that it was on its face void for indefiniteness. The plaintiff, upon his evidence, was entitled to recover in the action, provided the demanded premises were identified as "Pelican Beach," since it is

admitted that the heirs of George Lott were seized at the time of their conveyance to Cornelius Fornet.

The identity of Pelican Beach with the demanded premises is found by the trial court, and the evidence sustains the finding. It was shown that Pelican Beach, was the name originally applied to the salt meadows, marsh and beach on the westerly end of Barren island, extending from the wooded part of the island westerly to the inlet known as Plum Gut, which separated Barren island from Coney island, a distance of about four miles. Sometime between 1840 and 1845, a new inlet opened across Pelican Beach, extending from the Atlantic ocean on the south, to Sheepshead bay on the north, which separated the greater part of Pelican Beach from Barren island, leaving a strip of salt meadow, marsh and beach about three miles long between the island and Plum Gut inlet, and when the new inlet was opened, Plum Gut inlet gradually filled up, but it was still open when the deed of September 12, 1855, was given. Upon these facts there can be no question that that deed related to that part of Pelican Beach cut off from Barren island by the new inlet, and was properly described in the deed as "Pelican Beach *near* Barren island." Subsequently Plum Gut inlet wholly filled up, and the part of Pelican Beach which was formerly separated by this inlet from Coney island, was united to it, no inlet intervening. But this union did not extinguish the title of the heirs of George Lott, or those who succeeded thereto, to the land formerly known as Pelican Beach.

The claim that Pelican Beach, described in the deed of September 12, 1855, had disappeared by the encroachment of the sea, is not sustained by the evidence. The shore line, as the evidence shows, had advanced northerly to a considerable distance, and the northerly line also had to some extent been advanced further north than formerly. But the greater part of the land now connected with Coney island, east of where Plum Gut inlet formerly was, was a part of Pelican Beach in 1855, and the accretion on the north inured to the benefit of the owners of the beach.

The only remaining question arises upon the claim of the defendant that the deed of December 18, 1880, from John H. Platt, the assignee in bankruptcy of Abraham B. Coleman, to the plaintiff Almira Coleman, at which time the defendant was in possession of the demanded premises, under a deed from the heirs of George Lott, dated July 3, 1877, which purported to convey the same premises formerly conveyed by them to Cornelius Fornet, was void as in contravention of the statute, which provides that every grant of land shall be absolutely void, if, at the time of the delivery thereof, such land shall be in the actual possession of a person claiming under a title adverse to that of the grantor. (1 R. S. 739, § .) The deed from Platt, the assignee in bankruptcy, to the plaintiff, was executed under the order of the bankrupt court, made upon the petition of the bankrupt, showing that the plaintiff in the year 1856, purchased the property in question of the bankrupt, and paid therefor, and that by mistake it was omitted from the description in the deed of July 24, 1856, from Abraham B. Coleman, the bankrupt, to the plaintiff. The deed from Platt recites that it was made to correct such mistake. The case of *Stevens v. Hauser* (39 N. Y. 302) is we think a conclusive answer to the objection that the deed was champertous. The order of the bankrupt court was made in the administration of the estate of the bankrupt, upon proof of equitable circumstances entitling the plaintiff in a proper action to the reformation of the deed of July 24, 1856, and this relief might properly be given by the order of the bankrupt court, in the absence of any objection by the parties in interest. The deed of December 18, 1880, given in pursuance of the order, is not within the mischief at which the statute was aimed, or the intention of the legislature.

We find no error in the record, and the judgment should therefore be affirmed.

All concur.

Judgment affirmed.

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SAMUEL S. BLISS, Respondent, v. ROYAL L. JOHNSON et al.,
Administrators, etc., Appellants.

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129	182
94	236
133	84

94 28
157 58

One holding the legal title to lands, although not actually occupying, will be considered as constructively in possession thereof, unless they are in the actual hostile occupancy of another under a claim of title.

Where the true owner has been dispossessed if the dispossession terminates within twenty years, the possession will be considered as having returned to him; to defeat his title the adverse possession must be continuous for twenty years.

One J. held the legal title to the whole of a highway; S., to whose title plaintiff succeeded, took title, in 1837, to a farm adjoining the highway under a deed which by its terms bounded the lands on the north by the center of the highway; immediately thereafter S. built a fence extending one rod into the highway, along the entire north line of his farm, and he and his successor in title continued to occupy the inclosed strip under claim of title until 1846, when, upon a survey establishing J's title to the whole highway the fence was removed back to the south line thereof, and thereafter no part of it was inclosed. From 1867, when plaintiff purchased and took possession, down to 1875, he occupied a strip of land one rod wide adjoining his farm, by plowing, cultivating and mowing it each year. *Held*, that conceding both of these periods of occupation were hostile in inception and continuous in character and sufficient to initiate a claim to an adverse possession, they did not bar the right of the true owner as there was not a continuous adverse possession for twenty years.

During the period between 1846 and 1867, T., plaintiff's predecessor in title, once a year cut the grass from a small plat of ground in the highway, a row of trees was also planted by him in the highway in 1804, which were within a few years thereafter taken up or destroyed, and he sometimes piled lumber in the highway against his fence. He did not occupy the highway in any other manner. *Held*, that the evidence failed to establish a claim by adverse possession.

The setting out of trees or the building of a sidewalk in a highway by the owner of adjoining lands, as authorized by the act of 1863 (Chap. 93, Laws of 1863), is not such an occupation as can be made the foundation of a claim to title by adverse possession as against the true owner.

(Argued November 28, 1883, decided December 11, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 30, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

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This was an action for assault and battery. The defense was that the acts complained of were done by defendants lawfully in defense of their possession.

The case is reported upon a prior appeal, in 73 N. Y. 529.

It appeared upon the trial that the assault complained of grew out of a controversy between the parties who owned adjoining farms in respect to the right to a quantity of hay, which plaintiff had cut on the south side of the highway adjoining his farm. The hay was left by plaintiff to dry; in his absence defendants went into the highway and commenced raking and gathering it into piles for removal, on perceiving which, plaintiff went with his team and wagon to load and carry it away, and the affray then occurred. Defendants claimed that Royal Johnson, one of the original defendants, who died after verdict, owned the land upon which the hay grew, that it belonged to him and his son, the other defendant, and that the alleged assault was committed in resisting plaintiff's attempt by force to prevent its removal.

The further material facts are stated in the opinion.

M. M. Waters for appellants. The title to the highway was a proper subject of inquiry in this action. (*Bliss v. Johnson*, 73 N. Y. 529.) The legal title to land is presumptive evidence of possession. (Code of Civil Proc., § 368.) If the true owner be in possession of a part of the land, claiming title to the whole, his seizin extends by construction of law to the whole. (3 Wheat. 213; Code of Civil Proc., § 370; *Thompson v. Burhance*, 79 N. Y. 93.) While a void deed is sufficient to determine the extent of the possession under it, and to base an adverse holding of lands which are vacant, yet, if the true owner be at the same time in possession of a part of the land, claiming title to the whole, then his seizin extends by construction of law to all the land which is not in the actual possession by inclosure, or otherwise, of the party claiming under the defective title. (4 Wheat. 213; 8 Cranch, 229; 3 Peters, 291; 9 Wend. 311, note; 1 Comst. 528; 71 N. Y. 380; 9 Johns. 167; 1 R. S. 739, § 147; 20

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Barb. 429; 39 id. 513; 11 id. 285; 46 id. 211; 71 N. Y. 189; 22 id. 170; 19 Johns. 167; 24 Am. Rep. 430; 2 Wend. 166, 177; 9 Cow. 530, 552; 1 Johns. 155; 5 Cow. 371; Civil Code, §§ 370, 372; 54 N. Y. 377, 387, 631; 44 Barb. 181; 68 N. Y. 459; 44 id. 577; 70 id. 325; 71 id. 380; 9 Weekly Dig. 282; 22 How. 212; 4 Peters, 480.) Taking a deed is not enough to make an adverse possession. (3 Washburn on Real Estate, 128, 129, 136.)

Wm. J. Montanye for respondent. The possession and occupation of the *locus in quo* by plaintiff and his grantors as proven, in connection with their deeds, which purported to convey to the center of the road, barred defendant's right of entry, and gave to plaintiff the title. (*Jackson v. Todd*, 2 Caines, 183; *Jackson v. Ellis*, 13 Johns. 118; *La Frombois v. Jackson*, 8 Cow. 589, 619, 620, 618, 609; *Jackson v. Waltermire*, 7 Cow. 353; *Kent v. Harcourt*, 33 Barb. 491; *Towle v. Remsen*, 70 N. Y. 316; *Despard v. Walbridge*, 15 id. 374; *Crary v. Goodman*, 22 id. 170, 175-6; *Allen v. Welch*, 18 Hun, 226; *Sparhawk v. Bagg*, 16 Gray, 583, 585; *Hammond v. Zehner*, 21 N. Y. 118; 2 Hilliard's Real Prop. [4th ed.] 294, 289; *Wilklow v. Lane*, 37 Barb. 244; *Vanderzee v. Vanderzee*, 30 id. 331; *Bradstreet v. Clark*, 12 Wend. 603; *Smiles v. Hastings*, 22 N. Y. 217; *Peckham v. Henderson*, 27 Barb. 307.) The Johnson deed should be construed, and was intended to convey the remainder of land not conveyed to Wattles. The measurements in the Wattles deed are to be controlled by the boundary "to the road," and so they are in the Johnson deed. (2 Hilliard's Real Prop. [4th ed.], 498-499, 524, note d; *Wendell v. Jackson*, 8 Wend. 183; *Drew v. Swift*, 46 N. Y. 207; *Yates v. Van Bogert*, 56 id. 526; 1 Cow. 605; 5 id. 346, 371; 9 id. 661; *Lodge v. Barrett*, 46 Penn. St. 485.) The refusal of the court to admit Royal Johnson's testimony as to the conversations between him and Wattles and Williams' agent at the time of the giving of the deeds was proper, as it called for transactions between the witness, a party, and plaintiff's grantor who was dead, or in which

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plaintiff's grantor took part. (Code of Civil Proc., § 829; *Mattoon v. Young*, 45 N. Y. 696; *Brague v. Lord*, 67 id. 495.)

RUGER, Ch. J. The general principles involved in the disposition of this case were discussed and determined upon the former appeal to this court, reported in the 73 N. Y. Reports; and need not, therefore, be further considered.

The assault and battery which was the subject of the action took place in 1875 in the public highway which divided the respective farms of the plaintiff and defendants. On the trial each of the parties to the action claimed title to the *locus in quo*, but it was established by the proof, and assumed by the court, that the defendant, Royal Johnson, by virtue of a deed from the owner in 1835 took and from that time down to the date of the affray held the legal title to the whole of such highway.

The plaintiff attempted to establish title to that half of the highway which adjoined his premises, and upon which the affray occurred, by proof of an adverse possession thereof, existing for a period of upwards of twenty years by himself and his grantors. The facts upon which this claim was founded were controverted by the defendants; and the question as to which of these parties owned the land in dispute was a material one upon the trial of the case. (*Bliss v. Johnson*, 73 N. Y. 529.)

The court left it to the jury to determine upon the whole evidence whether the plaintiff had established his right to the premises by reason of an adverse possession; and to this decision the defendants duly excepted. The defendants also requested the court to affirmatively charge the jury that there was not sufficient evidence of an adverse possession, to authorize them to find that the plaintiff had thereby acquired title to the land in dispute. The court refused this request, to which refusal the defendants also excepted.

These exceptions present the only questions in the case, and their consideration requires an examination of the evidence bearing upon them.

This property being a public highway the public right in it

was obviously inconsistent with a permanent appropriation of any part thereof by either party; and the occupation of it which could be shown by any one was necessarily subject to the right to the use of its every part by the public as a common highway. The necessity of leaving a public road open for the use of the traveling community and which would appear to preclude the occupation of such road in the way in which the ownership of real property is usually manifested, would seem to render it difficult for an individual to establish a right to a highway through an adverse possession, which is generally required to be exclusive as well as continuous.

The plaintiff, however, claims to have done so in this case, and that claim must be examined. The time during which he asserts that he and his grantors had such possession extended from 1837 to 1875, covering a period of thirty-eight continuous years. It may be conceded that his remote grantor, one Surdam, in 1837 took title to the plaintiff's farm under a deed which bounded him to the center of the highway, and immediately thereafter built a fence extending one rod into the highway, on the entire north line of his farm, and from that time to the year 1846, through his remote and immediate grantors, Surdam and Tracy, under a claim of title, continued to occupy and cultivate all of the land within such inclosure.

The undisputed evidence shows that in the year 1846 a survey of the respective farms of the parties herein, by one Boulton, established the fact that the defendant Johnson had the legal title to the whole of the road in question. In the same year Tracy removed the fence referred to back to the southern boundary of the highway, and since that time no part of such road has been inclosed by either of the owners of the adjoining lands.

It may also be claimed from the evidence, and conceded in this argument, that from the year 1867, when the plaintiff purchased and took possession of his farm, down to the time of the affray, that he actually occupied a strip of land one rod wide adjoining his farm in the highway by plowing, cultivating, and mowing it each year of his occupation. Should it also

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be conceded that both of these periods of occupation were hostile in their inception and continuous in their character, and sufficient in themselves to initiate a claim to an adverse possession, and to such a possession as would, if continued for a sufficient length of time, have barred the right of the true owner to reclaim his land, it would yet fall short of the evidence necessary to authorize a jury to find twenty years, continuous adverse possession of the premises. It is undisputed that the appropriation of this land by an inclosure and its cultivation was abandoned by Tracy in 1846, and the inference is irresistible that this was done under a belief that he had no valid claim to the land in the highway. During the entire period intermediate the years 1846 and 1867, the lands now owned by the plaintiff were owned and occupied by his grantor, Tracy, and unless the whole or some part of that portion of Tracy's occupation of the highway in question was adverse, the plaintiff's case will have failed for want of evidence of the duration and continuity of the possession necessary to establish his claim. The entire evidence upon this subject was furnished by Tracy himself, and is concisely and fully stated in his own language as follows: "I have not occupied that road myself in any manner excepting to enter once a year to cut a little grass and throw it over my fence, no more than setting out trees and leaving lumber there. The law allowed me to set out shade trees or fruit trees by the side of the road. I think it was after that law was passed that I set them out, and up to that time I had never occupied it for any other purpose except once a year to go over and mow that rich spot there; that was a spot half as big as this room. The public always traveled this road. I never inclosed any portion of it at any time, and I never cultivated it or mowed it in any other way than as I have specified." It also appeared that the trees in question consisted of one row of apple trees outside of the fence, and planted in the year 1864. These trees were all within a few years taken up or destroyed. He further says that he occupied the land between the south road fence and the beaten track "no way more than to leave lumber piled against the fence on the west side of the

gateway." "I took no part in the Boulton survey. I became satisfied that the chains and links did end where Boulton found it. My hope was to see if I could not hold beyond the chains and links, and if there was a mistake in the count I thought I would hold to the bounds." It does not appear that Tracy ever made any actual claim of title to the highway in question at any time; and the whole claim is, therefore, based upon the constructive possession which his actual occupation under a deed which apparently bounded him by the center of the highway indicated.

It is obvious from this evidence that the trees in question were set out in the road, not under any claim of title, but solely by virtue of the privilege conferred by chapter 98 of the Laws of 1863 upon the owners of lands fronting upon highways, to build sidewalks and set out trees along such land in the highway. Such an occupation of land not having been instituted under a claim of title could not be made the foundation of a claim to its adverse possession as against the true owner.

This leaves the plaintiff to depend as the sole ground of his claim to the ownership of the strip of land extending one rod wide and about fifty rods long in the highway north of plaintiff's farm upon the evidence of his grantor that he sometimes piled a quantity of lumber in the road against the fence, near his gateway, and annually mowed and converted the grass growing upon a plot of ground in the road, not exceeding, probably, one or two rods square.

We cannot resist the conclusion that this evidence was totally insufficient to establish a title in the plaintiff to the land in question. While the law authorizes the owner of lands adjoining a highway to use and occupy it in any manner not inconsistent with the right of passage thereon by the traveling public, yet its permanent occupation by inclosure or cultivation is manifestly inconsistent with such right of passage; and no matter how long continued, can certainly never ripen into a title as against the public, whatever may be the rule as to its effect upon the owner of the soil of such highway. The fact,

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therefore, that the defendant Johnson did not take and hold the actual occupation of the highway in question does not militate against his title, inasmuch as he had all of the possession of the property in question of which it was legally susceptible. The settled principles of law require courts to consider the true owner as constructively in possession of the land to which he holds the title, unless they are in the actual hostile occupation of another under a claim of title; and this rule is still more imperative in the case of wild and uncultivated tracts or lands which are not legally susceptible of actual occupation and cultivation. (*Doe v. Thompson*, 5 Cow. 371; *Thompson v. Burhans*, 79 N. Y. 99.) This possession is deemed to continue until there is an actual disseizin and expulsion of the true owner from the land, and when such dispossession terminates, if it does terminate within twenty years, the possession is, by construction of law, considered as having again returned to him who holds the legal title. (*Doe v. Thompson*, *supra*; *Thompson v. Burhans*, *supra*.)

It would seem to follow that the highway in question must be deemed to have been in the possession of the defendant Johnson at all times during the period in question, when it was not actually occupied by another under a claim of title. The occupation shown by the evidence in this case of the *locus in quo* by Tracy, subsequent to the year 1846, was altogether too trivial in character to support a claim to its adverse possession during that period. It was held in the case of *Wheeler v. Spinola* (54 N. Y. 387) that cutting a few loads of grass upon an otherwise unoccupied and uninclosed lot in each year for the space of twenty years would not constitute a sufficient possession to confer title upon the person performing such acts of possession. In *Miller v. Downing* (54 N. Y. 631) it was also held that one who was accustomed to have a wood pile upon a vacant lot for thirty years, and had buried potatoes upon it for six years, had acquired no title to the lot by such a possession. The authority of these cases seem decisive of the questions presented upon this appeal.

There has not only been a failure to show a continuous

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adverse possession of the premises in question, by the plaintiff or his grantors for the period of twenty years, but the possession of Tracy for the twenty years prior to 1867 was not only insufficient in itself to establish any adverse right, but it was not held under a claim of title such as the law requires.

Much as we regret to disturb a judgment obtained after long litigation, and which seems to be not greatly inconsistent with the merits of the case, regard for settled principles leaves us no alternative but to reverse it.

The judgment should therefore be reversed, and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

JANE A. WEED et al., Appellants, v. CHARLES A. WEED, Impleaded, etc., Respondent.

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112	116
94	243
173	62

A devisee who claims a mere legal estate in the real property of the testator, when there is no trust, cannot maintain an action for the construction of the devise, but must assert his title by a legal action, or, if in possession, must await an attack upon it and set up the devise in answer to the hostile claim.

Where a person with full knowledge of all the facts, but through a mistaken belief that his interest in real estate was not subject to sale on execution, has lost his title through a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale after the time for redemption has expired, the court has no power to permit a redemption.

A mistake as to legal rights is not a ground for equitable relief.

(Argued November 28, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 10, 1882, which affirmed in part and reversed in part a judgment entered upon the report of a referee.

The complaint in this action alleged in substance, that by the will of Minerva Sherwood, who died seized of certain

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premises situate in Broome county, which are described in the complaint, she gave and devised the said premises to the plaintiff, Jane A. Weed, with the condition, however, that should said plaintiff die leaving no child or children, grand-child or grandchildren, then that the fee of the premises should pass to certain persons named, and the will directed that the premises "shall not be in any manner conveyed during the life of said Jane A. Weed;" that under judgments rendered against said Jane A. Weed the premises were sold by the sheriff of Broome county, and the defendant, Root, has received a sheriff's deed, and is prosecuting summary proceeding against said Jane A. Weed to turn her out of possession, which is held by the plaintiffs. The relief demanded was that a construction be given to the will adjudging that plaintiffs have a right to hold possession inalienable during the life of said Jane A. Weed, and that upon payment of the amount of the judgments the claims of the defendants thereto be adjudged, vacated and canceled, and that further prosecution of the summary proceedings be restrained.

The referee found in substance among other things that all of the plaintiffs' right and interest in the premises was duly and regularly sold on execution as alleged in the complaint; that after the sale defendant Root, who held a judgment against said plaintiff, duly redeemed the premises as such judgment creditor, and no other redemption having been made, after the expiration of fifteen months the sheriff executed and delivered a deed thereof to said Root; that said plaintiff had full knowledge of the judgment, execution and sale, but understood and believed that her title was inalienable.

As conclusions of law the referee found, that by virtue of the sheriff's sale and deed the legal title to the premises passed to Root; and that a court of equity has not the power to allow Jane A. Weed to redeem. Judgment was directed dismissing the complaint; and a judgment was entered embodying the legal conclusions of the referee.

The General Term reversed so much of the judgment as declared the rights of the parties, but affirmed the residue.

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Ausburn Birdsall for appellants. The levy, by the sheriff to whom the execution issued on the Mathews judgment was delivered, upon the personal property of Jane A. Weed, to an amount sufficient to satisfy the judgment, was a satisfaction of the same, and the subsequent sale of the premises devised by Miss Sherwood to Jane A. Weed upon the aforesaid judgment and execution was without authority of law and void. (*Hoyt v. Hudson* 15 Johns. 308; *Clark v. Withers*, Lord Raymond, 1073; 1 Salk. 322; *Ladd v. Blunt*, 4 Mass. 403; *Reed v. Prow*, 7 Johns. 428; *Ex parte Lawrence*, 4 Cow. 417; *Jackson v. Bowen*, 7 id. 21; *Ontario B'k v. Hallett*, 8 id. 194; *Wood v. Tony*, 6 Wend. 563.) A court of equity has the right and power to compel the defendant, Charles O. Root, to accept the amount due from the plaintiff, Jane A. Weed, and relinquish to her his interest in the premises acquired under his redemption. (Code, § 724; Story's Eq. Jur. [Redfield's 9th ed.], §§ 122, 123, 124, 12; Powell on Con. 196.)

Alex. Cumming for respondent. The estate of Jane A. Weed was alienable and the referee was right in holding she was not entitled to redeem. (Const. 1846, art. 1, § 13; 2 R. S. [6th ed.] 1100, § 2; id. 1092, § 3; *Reed v. Vanderheyden*, 5 Cow. 719; 4 Kent's Com. [12th ed.] 131; Girard's Titles to Real Estate, 487, §§ 130, 152; *Rockford v. Hickman*, 10 Eng. L. and Eq. 64; *DePeyster v. Michael*, 6 N. Y. 467; *Sweet v. Green*, 1 Paige, 473; *Kellogg v. Wood*, 4 id. 578; *Nichol v. N. F. & E. R. R. Co.*, 12 N. Y. 121.) An heir at law of a testator or a devisee, who claims a mere legal estate in the real property, when there is no trust, cannot maintain a bill in equity to obtain a judicial construction of the will. (*Van Amburgh v. Gates*, 11 Paige, 505; *Woodruff v. Cook*, 47 Barb. 304.) A bill in equity will not lie when there is an adequate remedy at law. (3 R. S. [6th ed.] 631, §§ 65, 66, 70; id. 634, §§ 82, 83.) All the requirements of the statute giving the right to redeem must be strictly complied with. (Herman on Executions, § 263; 3 R. S. [6th ed.] 631, §§ 65, 66;

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Gilchrist v. Comfort, 34 N. Y. 235; *Walter v. Harris*, 7 Paige, 168; 3 Wait's Actions and Defenses, 150.) A purchaser on redeeming takes all the title of the judgment debtor, and the benefit of all estoppel and covenants running with the land. (*Sweet v. Green*, 2 Paige, 478; *Kellogg v. Wood*, 4 id. 578.) A bill in equity will not lie, because there was an adequate and complete remedy at law, viz.: the right of redemption given by statute. (*Spafford v. Bangor*, 66 Me. 51; *Gray v. Tyler*, 40 Wis. 579; *Graham v. Roberts*, 1 Head, 56; *Thompson v. Manley*, 16 Ga. 440; *Lyday v. Douple*, 17 Md. 188; *Coughran v. Swift*, 18 Ill. 414; *Bassett v. Brown*, 100 Mass. 355; *Moon v. Terry*, 1 Texas 42; *City of Peoria v. Kidder*, 26 Ill. 351; *Merrill v. Gorham*, 6 Cal. 41.)

ANDREWS, J. Under the will of Minerva Sherwood, the plaintiff, Jane A. Weed, took a fee in the house and lot devised to her, determinable upon her death without issue, in which event the premises were given over to other persons designated in the will. The question whether the devised premises were subject to sale on execution against the primary devisee, depends upon the construction and legal effect of the clause in the will annexed to the devise which directs that "the house and lot shall not be in any manner conveyed during the life of Jane A. Weed." The complaint bases upon this clause a prayer for judgment, declaring among other things that the devisee had an inalienable interest or estate during her life in the premises devised. It is plain that if the real estate devised to plaintiff was by the clause referred to rendered inalienable during her life, either by her voluntary conveyance or sale on execution, the defendant Root acquired no title under the sale on the Matthews judgment and the redemption proceedings.

Whether the clause in the will restraining alienation is, as claimed by the defendants, repugnant to the estate devised and therefore void, is purely a question of law. Its determination involves legal questions and considerations only, and no element of equitable jurisdiction, and the case in this aspect is not of equitable cognizance. A devisee who claims a mere legal estate

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in real property of the testator, where there is no trust, cannot maintain an action for the construction of the devise, but must assert his title by ejectment or other legal action, or if in possession must await an attack upon it and set up the devise in answer to the hostile claim. (*Wambaugh v. Gates*, 11 Paige, 505.) This action cannot therefore be maintained in the first aspect presented.

Treating the action as one for redemption from the sale on the Matthews judgment, it seems an unanswerable objection that the court has no power to permit a redemption by a party who has lost his title to land by a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale, after the time for redemption given by statute has expired. It is doubtless true that the plaintiff, Jane A. Weed, in permitting the time for redemption to expire without availing herself of her right to redeem, acted upon the advice of counsel that her interest as devisee was not subject to sale on execution. Assuming the advice given to have been correct, her estate as devisee has not been divested. But assuming, as must be assumed, for the purpose of the point we are now considering, that her title was subject to sale on execution, the mistake under which she acted was not a mistake from the consequences of which a court of equity can relieve by allowing a redemption not authorized by statute. It was a mistake of law, with full knowledge by the judgment debtor of the execution and sale and of all the facts bearing upon her legal rights. The misapprehension of legal rights is a not uncommon cause of loss of property, and it has frequently happened that valuable interests have been sacrificed by an omission to take the steps marked out by the statute for redemption from sales on execution. The mistake of the plaintiffs was not induced by any act or conduct of Matthews or the defendant Root. They acted in hostility to the view taken by the plaintiff of her legal rights, and have consistently insisted throughout by their acts, that her interest in the land was subject to sale on execution.

The title of the defendant Root, as redeeming creditor, has been acquired under the law, and a court of equity cannot

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divest legal titles, except in accordance with its settled and acknowledged jurisdiction. It cannot on account of the hardship of a particular case, or because in a general sense it may deem it inequitable that a defendant under the particular circumstances should insist upon his legal rights, subvert a title fairly acquired under a regular sale on execution, without fraud, concealment, artifice, imposition or undue advantage on the part of the purchaser. The plaintiffs took the risk of the sale and the court cannot relieve her from the consequences of her mistake, if such it shall prove to be. If the plaintiffs have any remedy by application to the court to set aside the sale for irregularity or other reason, that remedy is unimpaired by this decision.

Our judgment proceeds upon the ground that the action here cannot be maintained in either aspect presented by the complaint, *first*, as an action for the construction of a will, or *second*, as an action to redeem from the execution sale.

We think the complaint was properly dismissed at the trial, and that the judgment should be affirmed, but without costs to either party.

All concur.

Judgment affirmed.

MARY RAYNOR, Appellant, v. LUCY MARIA RAYNOR et al., Respondents.

An order of General Term affirming an interlocutory judgment is not appealable.

It seems, that the party aggrieved must wait until final judgment is entered, when he may either appeal directly to this court (Code of Civil Procedure, § 1336), in which case the appeal will bring up for review only the determination of the General Term, affirming the interlocutory judgment, or he may appeal to the General Term (§ 1350), which appeal will bring up for review only the proceedings after the interlocutory judgment, and in case of affirmance he may appeal to this court, which appeal will present for review all the questions of law involved in the whole case.

94 248
116 95

94 248
117 521

94 248
121 150

94 248
127 688

94 248
150 546

94 248
162 267

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It seems also, that where the General Term, on appeal from either the interlocutory or the final judgment, grants a new trial, an appeal may be taken to this court (§§ 190, 191).

It seems, that a party aggrieved by an interlocutory judgment may also, after entry of the judgment, move for a new trial (§ 1001) on one or more exceptions contained in a case settled as prescribed (§ 997), and from the order granting or refusing the motion an appeal may be taken to this court (§ 190).

(Argued December 4, 1888 ; decided December 14, 1888.)

APPEAL from an order of the General Term of the Supreme Court, in the third judicial department, which affirmed an interlocutory judgment herein.

This action was for the admeasurement of dower. The material facts are stated in the opinion.

Geo. F. Comstock for appellant. When the fundamental questions in an action have been decided, but further proceedings are necessary to gather up the details of a litigation so that a final judgment can be pronounced and enrolled, and when a review of a decision is intended, the right to such review ought to exist before going through with the supplemental proceedings. (Code of Civil Pro., § 1001.) The jurisdiction of this court extends to all cases of interlocutory decision not excluded by the qualifying words "substantial rights," and "discretion." (40 How. Pr. 243; 10 Abb. Pr. Cas. [N. S.] 289; 11 id. 29.) When the General Term has effectually decided a case while it was in an interlocutory condition, then in an appeal from the final judgment afterward entered, one need not go again to the General Term to obtain a repetition of its decision. (36 N. Y. 619; 62 id. 250; 86 id. 162-167; Code of Civil Pro., § 1336.)

D. Pratt for respondents. This is an interlocutory judgment from which there is no appeal to this court. (Code, § 190; *Walker v. Spencer*, 86 N. Y. 162; *Barker v. Cocke*, 50 id. 689; *Catlin v. Grisler*, 57 id. 353.)

Opinion of the Court, per EARL, J.

EARL, J. The learned counsel for the defendants makes a preliminary objection that the appeal to this court is unauthorized, and we are of that opinion.

The judgment entered at the Special Term was not a final, but an interlocutory judgment. It appointed a referee who was to take an account of rents and profits, and improvements upon land, and ascertain the present value of dower, and upon payment by the plaintiff of a certain sum to be ascertained by the referee in the mode specified in the judgment, he, the referee, was to admeasure her dower; and he was to report the evidence taken by him with his findings thereon to the court; and all other questions were reserved until the coming in of such report, and the final hearing thereon.

There is but one case in which this court has jurisdiction to entertain appeals from any but final judgments, and that is provided for in subdivision 4 of section 190 of the Code. It is the general rule also that appeals from judgments in the Supreme Court, and the superior city courts to the general terms are confined to final judgments (§ 1346). But special provision is made by section 1349 for appeals to the General Terms from interlocutory judgments. There is, however, no provision anywhere authorizing such appeals to this court.

If upon the appeal from an interlocutory judgment to the General Term the judgment is affirmed, then the parties must go back to the Special Term and complete the further proceedings, and then final judgment may be entered upon the whole case. From the final judgment the party aggrieved thereby may, under section 1336, appeal directly to the Court of Appeals, in which case the appeal will bring up for review only the determination of the General Term affirming the interlocutory judgment; or he may, under section 1350, appeal to the General Term, which appeal will bring up for review only the proceedings to take the final judgment; and in case the General Term affirms the judgment, he may appeal to this court, and here present for review all the questions of law involved in the whole case, and raised by exceptions taken at the proper time.

Opinion of the Court, per EARL, J.

In case the General Term upon an appeal from an interlocutory judgment, as upon appeal from a final judgment, grants a new trial, then under sections 190 and 191, an appeal may be taken to this court.

But another course of practice is open to a party aggrieved by an interlocutory judgment. He may, after the entry of the judgment, under section 1001, move at the General Term for a new trial upon one or more exceptions contained in a case to be settled as provided by section 997; and in case the motion is granted or refused, an appeal may be taken to this court under section 190. But if no appeal is taken to this court from an order denying a new trial, then the practice must again conform to sections 1336 and 1350.

The learned counsel for the appellant claims that there is no practical difference between an appeal from an interlocutory judgment and a motion for a new trial at the General Term, as there is always in effect a motion for a new trial upon the argument of such an appeal. The difference between the two may not be very great, and in some cases may be wholly unimportant. But the Code, in all its provisions, recognizes a difference between appeals and motions for new trials (Code, §§ 190, 191, 999, 1001, 1002, 1003, 1004, 1336, 1350); and we in a very pointed manner recognized the difference in the case of *Walker v. Spencer* (86 N. Y. 162). In that case there was an interlocutory judgment with which both parties were dissatisfied. The plaintiff appealed from the interlocutory judgment to the General Term, and the defendant moved at the General Term, under section 1001, for a new trial. The General Term affirmed the judgment and denied the motion for a new trial, and then both parties appealed to this court; and here we dismissed the appeal of the plaintiff on the ground that an appeal to this court from an interlocutory judgment was unauthorized; and we held the defendant's appeal proper and affirmed the order denying the new trial. In the case of *Bennett v. Austin* (81 N. Y. 308) the appeal to this court was from an order of the General Term of the Supreme Court denying a motion for a new trial made under section 268 of the Code of Proceed-

Statement of case.

ure which was substantially like section 1001 of the Code of Civil Procedure, and hence we properly entertained the appeal. But there is this difference between an appeal from an interlocutory judgment and a motion for a new trial under section 1001. The motion must be based upon one or more exceptions, and hence can present only questions of law. The appeal brings to the General Term for review both questions of law and fact. Hence the appeal always brings up the same questions which can be presented upon the motion, but the motion does not always present the same questions which can be argued upon the appeal.

We are not concerned with the wisdom or utility of the provisions which we have referred to. They are plain and must control. (*Barker v. Cocks*, 50 N. Y. 689; *Catlin v. Grissler*, 57 id. 363; *Mundorff v. Mundorff*, 59 id. 635; *Elwell v. Johnson*, 74 id. 80; *Chesterman v. Eyland*, 74 id. 452; *Cambridge Valley Nat. Bank v. Lynch*, 76 id. 514, 516; *Victory v. Blood*, 93 id. 650.)

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

JOHN HONEGGER et al., Appellants, v. HENRY WETTSTEIN et al.,
Respondents.

The firm of W. O. & Co., of New York, ordered certain goods to be manufactured for them by plaintiffs at Z., Switzerland, at a specified price. Plaintiffs manufactured the goods, but, they having declined in the market, refused to deliver; they offered, however, to give said firm credit for a sum specified, and to send the goods on consignment, W. O. & Co. having the privilege as fast as the indebtedness was reduced below that sum, to take from the consignment sufficient goods to bring the debt up to the prescribed credit. The goods were delivered with that understanding. In an action against the individual members of said firm to recover for the goods so delivered, M. who had been appointed receiver of the firm in an action to close up the partnership, and who, by order of the court made on his own application, had been permitted to come in and defend, set up as a defense a violation of the revenue laws and proved

94	303
111	300
94	269
123	300
94	262
127	376

Statement of case.

upon the trial that the goods were sent through the custom-house at a valuation less than the stipulated price, the invoices accompanying them being made out at the market price on the day the goods were shipped from Z., while invoices at the stipulated price were given to the purchasers. The original defendants did not interpose this defense. Plaintiffs' counsel requested the court to direct a verdict against the original defendants with a proviso that plaintiffs should have no remedy as against the funds in the hands of the receiver. This was refused and a verdict directed for all the defendants. *Held*, error; that conceding a violation of the revenue laws was proved, as to which *quære*, the original defendants were not entitled to avail themselves of such a defense, as they had not pleaded it.

It seems that when it appears, in an action to recover for goods sold, by plaintiffs' own proof, or upon a defense properly interposed, that the goods were bought and sold for the purpose of being introduced into the country in violation of its revenue laws, and that the vendor shared in the illegal transaction or assisted in defrauding the customs, plaintiff may not recover; but unless it appears upon plaintiff's own showing or is pleaded as a defense, defendant is not entitled to the benefit of it as such.

O., one of said firm, was called as a witness for the receiver; his testimony was not directly contradicted. The court refused to submit the question of his credibility to the jury. *Held* error, that as he was an interested witness the question was for the jury.

The order allowing the receiver to come in and defend was granted upon his petition, in which he averred collusion between plaintiffs and one or more of the defendants, but only on information and belief, without stating any facts, or sources of information upon which the belief was based. This averment was positively denied by plaintiffs. *Held*, that the petition was insufficient to support the order and the same was improperly granted.

Also *held*, that the receiver had no such interest in the action as authorized him to intervene.

Also *held* that the order was reviewable here. (Code of Civil Procedure, § 1816.)

Honnegger et al. v. Wettstein et al. (15 J. & S. 125) reversed.

(Argued December 8, 1883; decided December 14, 1883.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 8, 1882, which affirmed a judgment in favor of defendants, entered upon a verdict, and also affirmed an order of Special Term, making Feodore Mierison, as receiver of the assets of the firm of Wettstein, Oehninger & Co., a party de-

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fendant, and giving him leave to appear and defend. (Reported below, 15 J. & S. 125.)

The nature of the action and the material facts are stated in the opinion.

D. M. Porter for appellants. It was not illegal for plaintiffs to take the risks of the consignment. (*Brooks v. Avery*, 4 Comst. 225.) If the indebtedness of the defendants' firm had not been reduced below 50,000 francs at any time, the goods would still continue the property of the plaintiffs. (*Converseville Co. v. Chambersburg Co.*, 14 Hun, 609; *Walker v. Buttrick*, 105 Mass. 237.) The custom laws are *malum prohibitum*, and not *malum in se*, and have no extra-territorial force, and the plaintiffs were not bound to know their provisions. (*Charles v. People*, 1 Comst. 180; *King v. Doolittle*, 1 Head [Tenn.], 77; *Arms v. Dauchy*, 82 N. Y. 443.) The defendants waived the alleged illegality in the transactions, if any there were, and affirmed the transactions, and the receiver being a third party, cannot object. (*Merritt v. Millard*, 4 Keyes, 308; *Pepper v. Haight*, 20 Barb. 429.) The receiver cannot retain any of the proceeds of the property consigned on account of any illegality, because he is a mere agent. (*Parkeburg v. Brown*, 16 Otto, 487; *Murray v. Vanderbilt*, 39 Barb. 140; *Bonsfield v. Wilson*, 16 M. & W. 184, 185; *Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, id. 449; *Dickinson v. Gilliland*, 1 Cowen, 481; *Acker v. Ledyard*, 8 Barb. 514-518; *Arden v. Patterson*, 5 Johns. Ch. 44, 52; *Simson v. Hart*, 11 Johns. 63; *In re Negus*, 10 Wend. 33, 34, 41.) The defendants Wettstein and Meyer have not alleged any defense of fraudulent importations, and consequently plaintiffs are entitled to recover against them. (*O'Tool v. Garvin*, 1 Hun, 92; *Brennan v. The Mayor, etc.*, 62 N. Y. 365; *Paige v. Willet*, 38 id. 28; *Potter v. Smith*, 70 id. 299; *McFerran v. Taylor*, 3 Cranch, 270; *Akin v. Albany M. R. Co.*, 14 How. 337; *Sawyer v. Chambers*, 11 Abb. Pr. 110, 112; *Webster v. Bond*, 9 Hun, 437; *Judd v. Young*, 7 How. Pr. 71; *Chandler v. Powers*, 25 Hun, 445; *Hornby v. Gordon*, 9 Bosw. 656, 658-9.) Third persons should not be permitted to intervene and be made par-

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ties to a pending suit upon their own application, unless their presence is necessary for an entire adjudication of the questions between the original parties, and then only in equity. (*Kelsey v. Murray*, 18 Abb. Pr. 294; *Davis v. Mayor, etc.*, 14 N. Y. 506, 526, 527-8; *Tallman v. Hollister*, 19 How. Pr. 508; *Judd v. Young*, 7 id. 79; *Ruger v. Heckel*, 85 N. Y. 483, 484; *N. Y. S. S. M. P. A. v. Remington*, 89 id. 22; Code of Civil Procedure, § 452.) The defendant Mierson certainly was entitled to nothing more than to protect the fund in his hands. (*Bostwick v. Menck*, 40 N. Y. 383.) The law will not presume an agreement void as illegal or against public policy when it is capable of a construction which would make it consistent with the law, and valid. (*Curtis v. Gokey*, 68 N. Y. 300, 304; *Bigelow v. Benedict*, 70 id. 203, 204, 205; *Ormes v. Dauchy*, 82 id. 443; *Thrall v. Newell*, 19 Vt. 202; *Shultz v. Hoagland*, 85 N. Y. 464; *Tracy v. Talmage*, 14 id. 162; *Lowell v. B. & L. R. R. Co.*, 23 Pick. 24; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368; *People v. Courtney*, 28 Hun, 589; *Gildersleeve v. Loudon*, 73 N. Y. 609; *McNulty v. Hurd*, 86 id. 547; *Kavanagh v. Wilson*, 70 id. 177.) The question as to whether the receiver was properly before the court, and the mode and substance of the trial, are properly reviewable on an appeal from the judgment. (*Kellum et al. v. Durfoo et al.*, 78 N. Y. 484.) The alleged release of Oehninger was simply introduced to establish the sum due the plaintiffs, and cannot be used for any other purpose. (*Woodcock v. Roberts*, 66 Barb. 498, 501.) It was ineffectual in any case. (*Harrison v. Close*, 2 Johns. 448; *Hoffman v. Dunlop*, 1 Barb. 186; *Fellows v. Stevens*, 24 Wend. 294, 298-9.) The order allowing the receiver to intervene is an intermediate order, and was specified in the notice of appeal, and necessarily affects the final judgment, and is reviewable hereunder. (Code of Civil Procedure, § 1316; *Kellum v. Durfoo*, 78 N. Y. 484; *Kilmer v. Hathorn*, id. 228; *Kelly v. Sheehan*, 76 id. 325; *Meriden Malleable Iron Co. v. Bandman*, 2 Weekly Dig. 591; *Dryfus v. Otis*, 54 How. 409; *McHenry v. Jewett*, 90 N. Y. 58; *Jordan v. N. S. and L. B'k*, 74 id. 467.)

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Lucien Birdseye for respondents *Wettstein* and *Meyer*. Where a contract, whether express or implied, is forbidden by law, whether expressly or by implication, and whether by the common or statute law, no court, whether at law or in equity, will lend its assistance to give it effect. (*Nellis v. Clark*, 20 Wend. 24; 4 Hill, 424; *Chamberlain v. Barnes*, 26 Barb. 160; *Freelove v. Cole*, 41 id. 318, 325; *Porter v. Havens*, 37 id. 343; *Hall v. Erwin*, 60 id. 349; *Moseley v. Moseley*, 15 N. Y. 335; *Starin v. Kelly*, 36 N. Y. Supr. Ct. 366, 370; *Smith v. Hubbs*, 1 Fairf. 71.) Contracts for the sale of goods are illegal where the goods were bought and sold for the express purpose of being introduced into the country by violations of its revenue laws, and the vendor is either a sharer in the illegal transaction or assisted in defrauding the customs. (*Holman v. Johnson*, Cowp. 341; *Biggs v. Lawrence*, 3 D. & E. 454; *Clugas v. Penaluma*, 4 id. 466; *Wamell v. Reed*, 5 id. 599; *Lightfoot v. Tenant*, 1 B. & P. 551; *Hodgson v. Temple*, 5 Taunt. 181; 1 Eng. C. L. 67; *Morck v. Abel*, 3 B. & P. 35; *Van Dyke v. Hewitt*, 1 East, 96; *Lowrey v. Bourdien*, Douglass, 468; *Armstrong v. Armstrong*, 3 My. & K. 45, 64; 8 Eng. Ch. 269, 279; *Pearce v. Brooks*, L. R., 1 Ex. 213, 218; *Cowan v. Milburn*, L. R., 2 Ex. 230; *The Reward*, 2 Dods. Adm. R. 271; *Simpson v. Bloss*, 7 Taunt. 246; 2 E. C. L. 69; *Fivaz v. Nichols*, 2 M. Gr. & S. 52; E. C. L. 501; *Hainay v. Eve*, 3 Cranch, 242; *Armstrong v. Toler*, 1 Wheat. 258; *Duncanson v. McLure*, 4 Dallas, 306; *Belding v. Pitkin*, 2 Cai. 147, 149; *Woodworth v. James*, 2 Johns. Cas. 417; *Whittaker v. Cone*, id. 58; *Hunt v. Knickerbocker*, 5 Johns. 327; *Graves v. Delaplane*, 14 id. 146; *Griswold v. Waddington*, 15 id. 57; 16 id. 438; *Patton v. Nicholson*, 3 Wheat. 204, 207, note; *Richardson v. Maine Ins. Co.*, 6 Mass. 102, 111; *Russell v. DeGrand*, 15 id. 35; *Wheeler v. Russell*, 17 id. 258; *Mosely v. Mosely*, 15 N. Y. 334; *Niver v. Best*, 10 Barb. 369; *Merrick v. Butler*, 2 Lans. 103; *Steuben Co. B'k v. Matthewson*, 5 Hill, 249; *Daimouth v. Bennett*, 15 Barb. 541; *Barton v. P. J. & U. F. P. R. Co.*, 17 id. 397; *Ross v. Truax*, 21 id. 361; *Bell v. Leggett*, 7 N. Y. 176; *Coppell v.*

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Hall, 7 Wall. 542, 558; *Oscanyan v. Arms Co.*, 13 Otto, 261, 268-9; *Drexler v. Tyrrell*, 15 Nev. 114, 131-140.) If these defendants either knew of the crime, and were participants in it and its fruits, or had just reason to suspect it, and were willing to take their part in its gains, still plaintiffs cannot sustain their action. (*Dwelly v. Van Houghton*, 4 N. Y. Leg. Obs. 101, 103-4; *Merritt v. Millard*, 3 Abb. App. Dec. 291; 4 Keyes, 213; *Kerrison v. Kerrison*, 8 Abb. N. C. 449; *Tracy v. Talmadge*, 14 N. Y. 162; *Pepper v. Haight*, 20 Barb. 438; *Westfall v. Jones*, 23 id. 9; *Schermerhorn v. Talman*, 14 N. Y. 93, 141; *Solinger v. Earle*, 82 id. 393, 397; *Knowlton v. C. & E. Spring Co.*, 57 id. 518, 533.)

John Hallock Drake for respondent *Mierson*, receiver, etc. This appeal does not bring up for review here the order permitting the receiver to make and serve an answer. (Code of Civil Procedure, § 1316; *Barrera v. Entensa*, 13 Pittsb. S. J. 341.) A contract founded upon an unlawful act, whether it be *malum prohibitum* or *malum in se*, cannot be enforced by action. (*Smith v. City of Albany*, 7 Lans. 4; *Bell v. Quinn*, 2 Sandf. 146; *Hamilton v. Gridley*, 2 Alb. L. J. 458; 54 Barb. 542; *Graves v. Delaplaine*, 14 Johns. 146.)

MILLER, J. This action was brought by the plaintiffs, to recover a balance of \$19,492.91 for goods sold and delivered, consigned or caused to be consigned, and for commissions and moneys paid out.

The plaintiffs are residents of Zurich in Switzerland, and in October, 1875, the firm of Wettstein, Oehninger & Co., of the city of New York, ordered goods to be manufactured for them by the plaintiffs, at the price of the material at the time of the order and the cost of manufacturing them. Before the goods were manufactured and shipped, goods of that kind had declined in price in the market of Zurich, from ten to fifteen per cent, and, in consequence of some doubt as to the responsibility of the defendants, the plaintiffs refused to deliver the goods so directed to be manufactured, but stated they would

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give Wettstein, Oehninger & Co. credit to the extent of 50,000 francs, and would send on consignment all the goods ordered and as fast as Wettstein, Oehninger & Co. reduced their indebtedness below 50,000 francs, they were to take from the goods so consigned an amount equal to the difference between what remained due and the 50,000 francs. Goods were sent directly to the defendants prior to January 1, 1876, and it appears that after that time they were sent under the above arrangement. Upon the trial, evidence was introduced showing that the goods sent after January 1, 1876, were sent through the custom-house at an alleged undervaluation, and in violation of the revenue laws of the United States. No such defense was set up in the answers of the defendants Wettstein and Meyer. It was, however, interposed in the answer of one Feodore Mierson, who had been appointed receiver in an action to dissolve the copartnership of Wettstein, Oehninger & Co. By an order of the Superior Court, made upon his own application, and dated Dec. 19, 1879, said Mierson was made a party defendant to this action, with leave to answer and defend the same, but no provision was made for an amendment of the summons and complaint, nor were the same amended in this respect. The principal evidence to sustain the allegation of an undervaluation, as made in the answer of Mierson, was duplicate invoices which were made of three shipments of goods of the value in the aggregate of 58,492 francs 70 centimes, which goods Oehninger, then being one of the firm of Wettstein, Oehninger & Co., testified he had ordered to be manufactured at a price agreed upon several months before the shipment thereof. He also testified that plaintiffs refused to deliver the goods, but offered to consign them at their own risk, that the duty bills were made at the actual price of the day at the time the goods were shipped in Zurich, and that plaintiffs were to invoice the goods at the market value. There were only three invoices as to which duplicates were offered in evidence, and there was no duplicate invoice as to the balance of plaintiffs' claim, to-wit: 31,225 francs 38 centimes, and the claims for commissions were on goods or

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dered by the defendants' firm through plaintiffs from third parties. It would seem, from the evidence, that the goods were plaintiffs' goods, unless the defendants reduced their credit below 50,000 francs, which was not done. If the plaintiffs refused to deliver the goods and they consigned them as their own, it is by no means clear that any offense was committed in violation of the revenue laws. Assuming, however, that a case was made out showing such an offense, it is difficult to see how the original defendants, Wettstein and Meyer, can avail themselves of such a defense. It was neither pleaded nor set up in either of their answers, and therefore they were not in a position upon the trial to insist that the goods shipped to them were fraudulently imported in violation of the laws of the United States, and that for that reason no action would lie by the plaintiffs against them for a recovery of the value of the same.

The cause of action alleged in the complaint was proven as against the defendants Wettstein and Meyer. Even although Mierson, as receiver, established the allegation that the invoices were fraudulent, and that the revenue laws had been violated, we think the plaintiffs were entitled to recover as against Wettstein and Meyer; and the court erred in refusing to direct a verdict in their favor against these defendants, as requested by the plaintiffs' counsel. The most that Mierson had a right to claim was the protection of the funds in his hands as receiver, and a judgment in favor of the plaintiffs, providing that they should have no remedy against the funds in the hands of the receiver, in accordance with one of the requests made by plaintiffs' counsel to charge, which was refused, would have fully protected his rights. Counsel for the defendants insists that they, having proved that the goods sued for and alleged to have been sold at one price, were by the plaintiffs valued and entered at a lower price in the invoices, prepared and transmitted by them with the goods, for the purpose of entering the same in the custom-house, and that plaintiffs had thereby knowingly made, or attempted to make, the entries thereof by means of the false invoices, in consequence of which the goods were for-

feited to the United States, the court was bound to take notice of the undervaluation, and that the contract proved being fraudulent by law, the court could not give effect to the same, and was justified in directing a verdict in favor of the defendants. The correctness of this rule is beyond dispute, and where it is made to appear, upon the plaintiffs' own proof or upon a defense interposed by the defendants in due form, that the contract in question was illegal, and that the goods were bought and sold for the express purpose of being introduced into the country in violation of its revenue laws, and that the vendor is either a sharer in the illegal transaction or assisted in defrauding the customs, it is a defense to the action, and the plaintiffs cannot recover. In the case at bar no such facts were proved by the plaintiffs upon the trial, and no such defense was set up in the answers of the original defendants. Numerous cases are cited by the respondents' counsel to support the position contended for, but we think that none of them go to the extent of holding that such a defense is available under a state of facts such as is presented upon this appeal. In the cases cited the illegality of the transaction was either pleaded or appeared on the plaintiffs' own showing, and the cases which are specially relied upon do not, we think, show that the defense of illegality was not admissible under the pleadings, or did not appear upon the plaintiffs' own showing.

The examination which we have given to the question considered leads us to the conclusion that, inasmuch as the defendants Wettstein and Meyer did not plead the defense of undervaluation in either of their answers, they were not at liberty to insist upon the illegality of the transaction. It would seem that the receiver, who represents the defendants, should not be permitted to occupy any better position in the defense than the defendants themselves. His whole title is derived from the defendants, who do not claim to defend the action upon any such ground as is set up in the answer of the receiver. The only ground upon which he can insist on such a defense, which the defendants refused to make, is that he represents the creditors, and hence it may be required in order to protect their

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rights. This is not enough, and he should not be allowed, on behalf of, and for the benefit of the defendants and without their request or approval and in opposition to their refusal, to insist upon the same. As we have seen, however, the receiver could not have been injured by a compliance with the last request of the appellants' counsel, which was refused by the court, as the fund in his hands was especially protected thereby.

The court also erred in directing a verdict in favor of the defendants for the reasons already stated; but independent of these there were no duplicate invoices as to a portion of the account, and for this as well as for the commissions on goods ordered by the defendants of other parties through the plaintiffs, the plaintiffs were clearly entitled to recover.

We also think that the court erred in refusing to submit to the jury the question made as to the credibility of the witness Oehninger. Although not contradicted, he was an interested party, and had a direct interest in increasing the fund in the hands of the receiver, and in preventing its payment to the plaintiffs. His evidence was given for the purpose of showing the alleged violation of law by the plaintiffs, and in explanation of the three invoices which were made of the goods, of which duplicates were made, and it was a fair question for the jury to say whether he might not have been influenced by the circumstances stated. The revenue laws are *malum prohibitum*, and not *malum in se*, and have no extra-territorial force. The plaintiffs, being foreigners, are not presumed to be acquainted with them, and every intendment is in favor of the plaintiffs. There was some evidence upon the trial which tended to show that the invoices, alleged to be fraudulent, may have been made in reference to the fall in price of the goods between the time they were ordered and the time they were shipped, and that has an important bearing upon the question arising as to the intent of the plaintiffs. Inasmuch, however, as a new trial must be granted for the errors already stated, it is not necessary to consider especially the effect to be given to this aspect of the case.

There is another ground which, we think, is fatal to the

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J. Newton Fiero for appellant. The board of supervisors was bound to levy and assess the amount of the judgment on the town of Kingston. (Laws of 1880, chap. 554.) The court had the right and it was its duty to apportion the debt due the relator on failure and neglect of the proper officials so to do. (*Hudler v. Golden*, 36 N. Y. 446; *Dibble v. Hathaway*, 11 Hun, 574; *Pillow v. Bushnell*, 5 Barb. 156; *Donaldson v. Wood*, 22 Wend. 395.) The intent of the statute being to place this burden upon the entire territory, its intent will not be defeated by the failure of its agents to act properly. (*Mt. Pleasant v. Beckwith*, 100 U. S. 514.) The rights of the creditors of a municipal corporation are protected from legislative invasion by the Constitution of the United States, and no repeal of a charter of a municipal corporation can so dissolve it as to impair the obligation of a contract, or as to preclude the creditor from recovering his debt. (Dillon on Municipal Corporations [3d ed.], §§ 170, 173.)

Howard Chipp, Jr., & John J. Linson for respondent. The board of supervisors is an administrative body, of limited powers, which are accurately defined by statute, and every act of the board in excess of, or in variance from, the powers conferred by statute is void. (*People v. Lawrence*, 6 Hill, 244; *Chemung B'k v. Supervisors, etc.*, 5 Denio, 517; *Supervisors of Richmond Co. v. Ellis*, 59 N. Y. 620; 3 R. S., marg. p. 472, § 102; 3 R. S. [7th ed.] 2403; Laws of 1880, chap. 554.) If it fails or neglects to perform its duty *mandamus* will lie against it to compel it to act. (*Town of Sand Lake v. Town of Berlin*, 2 Cow. 485.) In the absence of any provision in the act, dividing the town, for an adjustment of liabilities, the town of Kingston, as now constituted, as between debtor and creditor remains solely liable for the debts of the corporation. (*Hampshire v. Franklin*, 16 Mass. 76; *Morgan v. Beloit City and Town*, 7 Wall. 613; *Town of Depere v. Town of Bellevue*, 31 Wis. 120; *People v. Morrell*, 21 Wend. 563; Laws of 1838, chap. 332; *Crawford Co. v. Iowa Co.*, 2 Chandler, 14; *Milwaukee v. Milwaukee*, 12 Wis. 93; *Windham v. Portland*,

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4 Mass. 384; *N. Yarmouth v. Skillings*, 45 Me. 133; *Veasie v. Howland*, 47 id. 127; *Medford v. Pratt*, 4 Pick. 222; *Montpelier v. E. Montpelier*, 29 Vt. 12; *Hartford Bridge Co. v. E. Hartford*, 16 Conn. 149; *Hartford Bridge Co. v. E. Hartford*, 10 U. S. 511; *Richards v. Daggett*, 4 Mass. 539; *Richland Co. v. Lawrence*, 12 Ill. 1; *Plunkett Township v. Crawford*, 77 Penn. St. 102.)

EARL, J. On the 20th day of February, 1879, the relator recovered a judgment against the town of Kingston, in Ulster county. On the 28th day of November thereafter, the board of supervisors of that county, in pursuance of the power conferred by chapter 319 of the Laws of 1872, by an act duly passed, erected from a portion of the territory theretofore comprised within the town of Kingston, a new town, to which the name of Ulster was given; and another portion of the same territory, particularly described, was cut off and annexed to the adjoining town of Woodstock; and the act provided that "all the remaining part of the present town of Kingston, not included in either of the aforesaid boundaries, shall be and remain a separate town in the county of Ulster, by the name of Kingston." The action of the board of supervisors was legalized and confirmed by the act chapter 407 of the Laws of 1880. By this division of this territory the old town of Kingston was apparently left with less than three per cent of the property formerly within its limits. In November, 1882, the relator applied at a Special Term of the Supreme Court for a writ of *mandamus* to be directed to the board of supervisors, commanding them to levy and assess the amount due him on his judgment on the town of Kingston, or on the towns of Kingston, Ulster, and so much of Woodstock as in 1879 formed the town of Kingston, *pro rata*. The Special Term granted a writ commanding the supervisors to levy and assess the amount due the relator upon his judgment upon the three towns as prayed for by the plaintiff; and that the amount should be apportioned upon the territory formerly comprised within the town of Kingston before its division, according to the assessed valuation

of the property within the territory, as appeared by the tax-rolls of the several towns for the year 1882. From the order of the Special Term the board of supervisors appealed to the General Term, where the order was reversed and the motion for the writ of *mandamus* was denied, with costs ; and the relator then appealed to this court.

The General Term held that the relator, for the purpose of collecting his judgment, should have proceeded according to the provisions of the Revised Statutes, contained in article 2, title 1, chapter 11, part 1 (1 Revised Statutes, 338); and we are of the same opinion. Section 4 of that article provides, that "when a town seized of lands shall be divided into two or more towns, the supervisors and the overseers of the poor of the several towns constituted by such division shall meet as soon as may be after the first town meeting subsequently held in such towns, and when so met shall have power to make such agreement concerning the disposition to be made of such town lands and apportionment of the proceeds as they shall think equitable; and to take all measures and execute all conveyances which may be necessary to carry such agreement into effect." Section 5 provides that "when any such town shall be altered in its limits, by the annexing of a part of its territory to another town or towns, the supervisors and overseers of the poor of the town from which such territory shall be taken, and of the town or towns to which the same shall be annexed, shall, as soon as may be after such alteration, meet for the purpose, and possess the powers provided in the last preceding section." Section 6 provides that "if no agreement for the disposition of such lands shall be made by the supervisors and overseers, within six months after such division or alteration, then the supervisor and overseers of the poor of each town in which any portion of said lands shall lie shall proceed, as soon as may be, to sell and convey such part of said lands as shall be included within the limits of such town, as fixed by the division or alteration; and the proceeds arising from such sale shall be apportioned between the several towns interested therein, by the supervisors and overseers of the poor

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of all the towns, according to the amount of taxable property in the town divided or altered, as the same existed immediately before said division or alteration, to be ascertained by the last assessment list of such town." Section 7 provides that "when a town possessed of or entitled to money, rights or credits, or other personal estate, shall be so divided or altered, such personal estate, including moneys belonging to the town in the hands of the town officers, shall be apportioned between the towns interested therein, by the supervisors and overseers of such towns (who shall meet for that purpose as soon as may be after the first town meeting subsequently held in such towns) according to the rule of apportionment above prescribed." Section 8 provides that "whenever a meeting of the supervisors and overseers of two or more towns shall be required in order to carry into effect the provisions of this article, such meeting may be called by either of said supervisors." Section 10 provides that "debts owing by a town so divided or altered shall be apportioned in the same manner as the personal property of such town; and each town shall thereafter be charged with its share of such debts, according to such apportionment." These are ample and precise provisions for the payment of the debts of a town whose territory is divided. It is undisputed that the legislature had the power to make these provisions, and to require the debts of such towns to be paid in this way. These are all the provisions on the subject, and were intended to furnish creditors the only mode for the payment of their debts in the cases specified. But for the statute, or some other provision of law, upon the division of the old town of Kingston, all the liabilities of that town would have remained against the present town of Kingston; and it would have been entitled to all the property of the old town within its limits, and would have been obliged to discharge all its debts and obligations. (*Laramie County v. Albany County*, 92 U. S. 307; *Mount Pleasant v. Beckwith*, 100 id. 514.) Within the latter authority, too, if the old town of Kingston had been entirely blotted out, and its territory annexed to other towns; or if other towns had been carved out of it, and new municipi-

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palities had thus been formed, in the absence of any legislation providing for the payment of the debts of the old town, they would have devolved upon the new towns, to be paid by them in equitable proportions. But here express provision of law is made as to the manner of discharging the obligations of the old town; and those provisions are, at least in the first instance, exclusive and must be pursued. Under them all the debts of the old town of Kingston are to be apportioned by the officers named, between the three towns of Ulster, Woodstock and Kingston, according to taxable property, as the same existed immediately before the division, to be ascertained by the last assessment list of the town, which was the assessment list of 1879. The relator, therefore, has a plain remedy, which is by *mandamus* to compel a meeting of the present officers of the three towns, and a discharge by them of the duties devolved upon them by the statute. It cannot be doubted that a writ may be so framed and so enforced as to give the relator and all the other creditors of the old town of Kingston ample redress.

The act chapter 554 of the Laws of 1880 has reference only to the collection of judgments against towns which have not been divided or altered.

The order of the General Term should be affirmed with costs.

All concur.

Order affirmed.

CHARLES S. GUILLEAUME, Respondent, v. EDWARD ROWE et al.,
Appellants.

It seems that the issuing of an execution against the person of a judgment debtor is within the scope of the implied authority of the attorney for the judgment creditor; and when such an execution is issued and the debtor arrested thereon in a case where it is not authorized, the client may be held liable, although there be no evidence that he directed either the issuing of the execution or the arrest.

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After such an arrest the judgment creditors notified the sheriff that they "countermanded" the execution, and the latter thereupon informed the prisoner that he had been directed to discharge him if he would sign a stipulation not to sue for false imprisonment, and upon the prisoner's refusal assured him that if he did not sign it "he would have to stay in jail a long time." The prisoner then signed and was discharged. In an action for false imprisonment, *held*, that the release was void for duress and so furnished no defense.

Submitted December 7, 1883; decided December 14, 1883.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made April 30, 1882, which reversed a judgment in favor of the defendants, entered upon an order dismissing the complaint on trial, and which granted a new trial. (Reported below, 16 J. & S. 169.)

This was an action for false imprisonment.

The defendants employed an attorney to bring an action against the plaintiff, who obtained judgment in their favor. An execution against property was returned unsatisfied, and the attorney then issued an execution against the person. By virtue of it the plaintiff was arrested on the second of February and lodged in jail. Afterward the defendants, in their own person, under date of February 24, notified the sheriff that they "countermanded" that execution, and thereupon he informed the prisoner that he had an order to discharge him, if he would sign a stipulation not to sue the execution creditors or their attorney for damages on account of the arrest, and upon his refusing to do so assured him that if he "did not sign it he would have to stay in jail a long time." The prisoner signed the stipulation and was discharged. He then brought this action. Upon the trial these facts appeared, and it was also conceded that the last execution was not authorized by the judgment and was void. The trial judge held that the release did not bind the plaintiff, but upon defendant's motion, dismissed the complaint because, in his opinion, the evidence did not show that the defendants directed the issuing of the execution, and refused to submit that question to the jury.

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Blumenstiel & Hirsch for appellants. As the execution was properly issued, it is a complete answer to the suit. (Code, § 549, subd. 2; id., § 1487, subd. 1; *Rowe v. Guilleaume*, 18 Hun, 556, 557, 558, 559.) If the execution was void absolutely, then defendants were not liable unless some evidence were furnished showing that they authorized or ratified the act. (*Welch v. Cochran*, 63 N. Y. 181; *Clark v. Woodruff*, 83 id. 518, 525; *Brass v. Worth*, 40 Barb. 654; *Seymour v. Wyckoff*, 10 N. Y. 213; *Fox v. Jackson*, 8 Barb. 355.) In any event the evidence shows that the plaintiff expressly released his rights to sue the defendants by the stipulation. (*Todd v. Todd*, 2 Hun, 298; *Scroff v. Scroff*, 42 How. 348; *Schafer v. Guest*, 6 Robt. 264.)

John F. McIntyre for respondent. The evidence was sufficient to make the attorneys, who issued the execution against the person of the plaintiff, *prima facie* the agents of the defendants, and their acts binding upon the defendants, as their plenary authority as such attorneys had not ceased by a final recovery. (*Newberry v. Lee*, 3 Hill, 523; *Brown v. Feester*, 7 Wend. 301; *Oestrich v. Greenbaum*, 9 Hun, 243; *Brock v. Barnes*, 40 Barb. 521; *Malloch v. Sidley*, Daily Register, Aug. 25, 1883.) Authority can be deduced from the course of dealing and intercourse, or it may be deduced from the nature of the employment. (Story on Agency, § 45; 2 Kent's Com. 612, 618; Paley on Agency, 2.) When the agency is inferred from the relative situation of the parties, it is generally sufficient to establish the fact that the relationship was actually created. (Greenleaf on Evidence, § 64.) The defendants are answerable to the plaintiff for the issuance of the execution against his person and his incarceration thereunder. It matters little whether or no direct authority was given by the defendants to issue the execution. (*Foster v. Wiley*, 27 Mich. 244; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Barber v. Braham*, 3 Wils. 368; *Newberry v. Lee*, 3 Hill, 523; *Lynch v. Met. El. R. R. Co.*, 90 N. Y. 77; *Poucher v. Blanchard*, 86 id. 256.)

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It was not necessary to prove that defendants authorized the issuance of the execution against the person. It was sufficient to show the original retainer and that the act was done in the progress of the action. (*Fishkill Savings Ins. v. Nat B'k of Fishkill*, 80 N. Y. 162; *N. Y. & H. R. R. v. Schuyler*, 34 id. 30; *Holden v. N. Y. & E. B'k*, 72 id. 286; *Corning v. Southerland*, 3 Hill, 556.) The release is not a bar to the action, as the testimony shows that it was obtained from the plaintiff by a threat. (Greenleaf on Evidence, 302; *Fisher v. Shattuck*, 17 Pick. 252; 1 Parsons on Contracts, 393; *Watkins v. Baird*, 6 Mass. 506; *Strong v. Grannis*, 26 Barb. 122; 15 Johns. 256.) Mere fear of imprisonment constitutes duress. (*Richards v. Vanderpool*, 1 Daly, 71, 1 Cow. Tr. 264; 5 Hill, 157; *Evans v. Begleys*, 2 Wend. 243; *Forshay v. Ferguson*, 5 Hill, 154.)

DANFORTH, J. Upon this appeal the defendants must be held to the point on which they succeeded at the trial term. They then conceded that the arrest of the plaintiff was by virtue of an execution for which there was no authority in law, but had him turned out of court on the sole ground that there was no evidence showing that either of the defendants authorized the issuing of the execution or his arrest. The General Term were of opinion that a case was made out by the plaintiff, and we agree with that court. A party is bound by the acts of his attorney, although he does not give immediate direction as to the proceedings in an action, or is not with him at its successive stages. If he sets the attorney in motion he becomes liable as the cause progresses, and if the result is in his favor, is responsible for the methods resorted to for the enforcement of the judgment. This is well settled. (*Barker v. Braham*, 3 Wils. 368; *Poucher v. Blanchard*, 86 N. Y. 256.) Here the retainer of the attorney was by these defendants, the issuing of the execution was within the scope of his implied authority, and the arrest of the judgment debtor was for the purpose of compelling payment. This was enough to make them liable. There was, however, evidence tending to show actual knowledge on

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Statement of case.

the part of the defendants, and at any rate acquiescence by them in the course adopted by their attorney. The court erred in taking the question from the jury and in dismissing the case as one where no cause of action was made out.

The learned counsel for the appellants now argues that by the stipulation the plaintiff released his right of action. But this proposition was decided against the defendant by the trial judge as well as the General Term. It has no merit. The instrument on which he relies was executed by the plaintiff without consideration and while enduring an imprisonment, which was illegal. It was, therefore, void for duress (*Foshay v. Ferguson*, 5 Hill, 154; *Evans v. Begleys*, 2 Wend. 243), and the defendants could acquire no right under it.

The General Term properly reversed the judgment and directed a new trial. Its order should be affirmed and, by reason of the defendant's stipulation, the plaintiff have judgment absolute.

All concur.

Order affirmed and judgment accordingly.

JACOB BROOKMAN et al., Appellants, v. FERDINAND KURZMAN,
Defendant.

A deed described the premises conveyed as situate in the city of New York, and bounded as follows: "Beginning at a point on the westerly side of Second avenue, distant fifty feet and ten inches from the south-easterly corner of Second avenue and One Hundred and Eleventh street; thence westerly and parallel with said One Hundred and Eleventh street, and partly through a party wall, eighty feet; thence southerly and parallel with Second avenue fifty feet; thence easterly and parallel with said One Hundred and Eleventh street eighty feet, to the westerly side of Second avenue; thence northerly and along said Second avenue fifty feet, to the place of beginning." The grantors had title to premises which would be included in the description if the word "south-easterly", were changed to south-westerly, and the grantee conveyed to plaintiff by deed, in which the description was thus changed. *Held*, that the use of the word "south-easterly" was not such a defect as justified defendant, a purchaser, in refusing to accept title; that by the intrinsic evidence fur-

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nished by the deed it appeared indisputably that the intent was to use the word "south-westerly."

In construing the description clause in a conveyance such an interpretation will be adopted as shall give effect to the intention of the parties if it can be ascertained from the instrument. For this purpose any particular may be rejected if inconsistent with other parts of the description, and if sufficient remains to locate the land intended to be conveyed.

(Submitted December 7, 1888; decided December 14, 1888.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon a case submitted under section 1279 of the Code of Civil Procedure.

The facts appearing in the case are substantially stated in the opinion.

James M. Fisk for appellants. If the description is uncertain we can turn to the mortgages referred to in the deed, and from them secure the correct description of the property intended to be conveyed by the grantors of Flannelly. (*Worthington v. Hylar*, 4 Mass. 196; *Jackson v. Clark*, 7 Johns. 217; *Robinson v. Kine*, 70 N. Y. 154; *Hathaway v. Power*, 6 Hill, 454; *Drew v. Swift*, 46 N. Y. 204; *Augustine v. Britt*, 15 Hun, 395; *B., N. Y. & E. R. R. Co. v. Stigeler*, 61 N. Y. 348; *Higinbotham v. Stoddard*, 72 id. 94.)

Ferdinand Kurzman, respondent, in person. If the subject of a grant cannot be ascertained by its description the grant becomes void from the necessity of the case. (2 Washburn on Real Property, 622, §§ 23, 24.) The vendors under their contract were bound to convey a good title; not merely to give a deed sufficient in form. (*Story v. Conger*, 36 N. Y. 637.)

RUGER, Ch. J. In March, 1871, Nicholas H. Moore and wife, and Daniel Murray, conveyed to John Flannelly by warranty deed certain premises situated in the city of New York, described in said deed as follows: "All those lots, pieces or parcels of land with the buildings thereon erected, situate, lying and being in the Twelfth ward of the city of New York, bounded and described as follows: Beginning at a point

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on the westerly side of Second avenue, distant fifty feet and ten inches from the south-easterly corner of Second avenue and One Hundred and Eleventh street; thence westerly and parallel with said One Hundred and Eleventh street, and partly through a party wall, eighty feet; thence southerly and parallel with Second avenue, fifty feet; thence easterly and parallel with said One Hundred and Eleventh street, eighty feet, to the westerly side of Second avenue; thence northerly and along said Second avenue, fifty feet, to the place of beginning." The same deed also conveyed a lot of land on the *southerly side of One Hundred and Eleventh street, in the rear of the above-described premises.*

The question in this case is whether the court may and should in the interpretation of this description read it so as to transform the word "south-easterly" into the word "south-westerly."

It appears that Flannelly's grantors had title to the premises on the west side of Second avenue which would be included in such a reformed description. It also appeared that Flannelly conveyed the premises acquired by him under said deed by a description which gave as its starting place a point in the westerly side of Second avenue, fifty feet and ten inches from the south-westerly corner of such avenue and One Hundred and Eleventh street. The word "south-westerly" was also used in the description contained in all of the deeds conveying said premises subsequent and previous to said deed of 1871.

In 1882 the plaintiffs contracted to sell and convey the same premises to defendant, describing them in accordance with the corrected description. Under said contract and in performance thereof, the plaintiffs tendered to the defendant a deed of premises on the westerly side of Second avenue, which corresponded with the description in said Flannelly deed, except in the use of the word "south-westerly" in the place of south-easterly. The defendant refused to receive said deed and fulfill his contract upon the ground that the title of said plaintiffs was defective on account of the use of the word "south-easterly" in the Flannelly deed instead of the word "south-westerly."

Upon an agreed statement of facts the parties submitted the

question to the court whether the use of the word "south-easterly" in the Flannelly deed, in contradistinction to the word "south-westerly" used in all other conveyances of this land, constituted such a defect in the plaintiffs' title as justified the defendant in refusing to accept the title offered to him. The court below held that it did and ordered judgment for the defendant.

In this we think they erred. We are of the opinion that by the internal evidence of the deed, the language of the description used, and the monuments, courses and distance therein referred to, it indisputably appears that the parties intended to use the word "south-westerly" therein instead of the word actually written. The use of a rough diagram, showing the intersection of the two streets named therein, crossing each other at right angles and running respectively north and south and east and west, demonstrates that the adoption of the term "south-easterly" as the one intended, would create a starting point for the boundary line of the property intended to be conveyed, in the center of Second avenue, and would locate the larger part of the granted premises in the traveled portion of such public highway. The same result would also follow if the description should be read as meaning the north-easterly corner of the said streets. The adoption of neither of the first two points stated would comply with the requirement of the deed, that the starting point should be on the westerly side of Second avenue, or that the first line should run parallel with One Hundred and Eleventh street; neither of the lines run from these points would include the buildings described as being upon the premises; nor run upon a line through a party wall, or finally terminate upon the westerly side of Second avenue, by a line which run along said Second avenue to the place of beginning.

The adoption of the term "north-westerly" as the corner intended would require the survey to run over the first line twice to make out the description, and leave a space of ten inches presumably running through the outer wall of the building, unconveyed on the line of One Hundred and Eleventh street,

thus cutting off the property from the street, and would also directly conflict with that portion of the deed which locates the other land conveyed in the *rear of the described premises on the southerly side of One Hundred and Eleventh street.*

The long established rules with reference to the construction of descriptions contained in conveyances require courts to adopt such an interpretation thereof as shall give effect to the instrument according to the intention of the parties, if that is discoverable from legitimate sources of information. (*Jackson v. Clark*, 7 Johns. 217; *Buffalo, N. Y. & Erie R. R. Co. v. Stigeler* 61 N. Y. 348.) In giving effect to such intention it is also their duty to reject false or mistaken particulars, provided there be enough of the description remaining to enable the land intended to be conveyed to be located. (*Hathaway v. Power*, 6 Hill, 454; *Wendell v. People*, 8 Wend. 189; *Loomis v. Jackson*, 19 Johns. 452.) It was said in *Robinson v. Kime* (70 N. Y. 154), that a conveyance is to be construed in reference to its visible locative calls, as marked or appearing upon the land, in preference to quantity, course or distance, and any particular may be rejected if inconsistent with other parts of the description and sufficient remains to locate the land intended to be conveyed. The rule that a monument controls other portions of the description in a deed is not inflexible; when the monument is repugnant to another of like character, or a map gives other results, the truth is to be ascertained from all of the facts of the case. (*Townsend v. Hayt*, 51 N. Y. 656; *Higinbotham v. Stoddard*, 72 id. 94.)

In the light of these rules what would have been the clear duty of any party who attempted to locate the land intended to be conveyed by this description?

Upon starting a survey from the south-easterly corner of Second avenue, he would find, not only that he was not beginning upon the westerly side of Second avenue but that he was locating the property conveyed in the public highway. Thus would be presented at the outset an insuperable obstacle to such a location; and this discovery would lead to the inevitable conclusion that the phrase used could not have been

intended by the parties, if there was any other meaning which could be extracted from the instrument. A further examination of the deed would disclose that the point of beginning was not only stated to be the westerly side of Second avenue, but also that the final line of such description was required to be entirely upon the westerly line of such highway and the southerly side of One Hundred and Eleventh street and terminate at the point of beginning on the westerly side of Second avenue.

It is impossible to mistake the location of the starting point of this description, which is thus not only twice correctly stated in the deed, but is also found to be in harmony with the location of all of the monuments referred to therein, as well as the remainder of the description. That part of the description which causes the place of beginning to be reached by a line along the westerly side of Second avenue from the south indicates unmistakably that the place of beginning was fifty feet and ten inches from the south-westerly corner of Second avenue and One Hundred and Eleventh street.

It is thus seen that the description contains abundant evidence as to the words which the draftsman intended to use.

The requirements that the land conveyed should be located on the westerly side of Second avenue, and to the south of One Hundred and Eleventh street; that the first line should run parallel with One Hundred and Eleventh street partly through a party wall; that the third line should run to the westerly line of Second avenue, and that the final line should run northerly along said Second avenue to the place of beginning, furnishes irrefutable evidence of the place intended for a starting point, and also of the intention of the parties as to the location of the land supposed by them to be conveyed by the deed in question.

We are not unmindful of the rule which excuses the vendee of real estate, under a contract of sale, from accepting a title which is of doubtful validity or questionable legality; but we are clearly of the opinion that the circumstances of this case remove it from any such category.

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The judgment of the General Term should be reversed, and judgment ordered for the plaintiffs, with costs of both courts.

All concur.

Judgment reversed.

94	278
159	468
159	474
159	481
159	486
94	278
164	329
94	278
170	187

HENRY M. ISAACSON, Appellant, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Respondent.

A carrier of passengers, by the sale of a passenger ticket, as incident to the contract, without any specific agreement or separate compensation, becomes obligated to carry the baggage of the passenger to a reasonable amount, and to deliver it at the end of the route to the passenger or his duly authorized agent.

The courts may take judicial notice of the system of checking baggage by railroad companies, and of the general practice, in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of its route to the next succeeding carrier, and so on until it reaches the possession of the last carrier.

It is within the apparent authority of a baggage-master so to check baggage, and where he receives it and agrees to check it through by a particular route the company is bound, although in fact he had no authority to check it by that route; at least it is a question of fact for a jury.

It seems that a baggage-master, in the absence of special authority, cannot bind his company by a contract to carry baggage beyond the terminus of its road, or fixing a special or unusual mode of delivery, as at a place other than the depot of the company.

The usual baggage-check delivered to a passenger is not regarded as embodying the contract of carriage, but only as a voucher or token to enable him to identify and claim his baggage at the end of the route.

In an action to recover for loss of baggage these facts appeared: Plaintiff held passage tickets for himself and family over defendant's road from New York to Niagara Falls, and also tickets from the latter place to New Orleans by the "Mobile route," in which route it did not appear that defendant had any interest, but it, in connection with defendant's road, formed a continuous line between New York and New Orleans. Plaintiff presented these tickets with his baggage to the baggage-master at defendant's baggage-room in New York city and requested him to check the baggage from New York to New Orleans by the route indicated.

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The baggage-master examined the tickets, assented to the request and gave plaintiff checks for his trunks, which he put in his pocket without examining. Upon the checks were the words "New Orleans and New York," and also certain letters and abbreviations which, as explained by experts, indicate the several roads forming the "Great Jackson route." Defendant delivered the baggage to the agent of the Great Jackson route at Niagara Falls, and while in transit it was destroyed by an accident. *Held*, that the undertaking of the baggage-master to check by the Mobile route was the undertaking of defendant, and included an agreement to deliver at the end of its road to the next succeeding carrier; that by the delivery to another carrier, in the absence of contributory negligence on the part of plaintiff, it remained liable as insurer; also that the omission of plaintiff to examine the checks was not such contributory negligence as prevented a recovery; that at least it was a question for the jury as to whether he had a right to repose upon the representation of the baggage-master without examining the checks, also as to whether an inspection of the checks would have apprised a person, not an expert or familiar with the roads making up the routes between New York and New Orleans, that a mistake had been made.

Isaacson v. N. Y. C. & H. R. R. R. Co. (25 Hun, 350) reversed.

(Argued October 3, 1883 ; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial. (Reported below, 25 Hun, 350.)

This action was brought to recover damages for the loss of plaintiff's baggage while *en route* from New York city to New Orleans.

The material facts are stated in the opinion.

Horace E. Deming for appellant. Whether the relation between the plaintiff and the defendant be considered one of contract or of voluntary bailment, the defendant must be held liable for the loss consequent upon the diversion of the plaintiff's baggage. (*Ransom v. Holland*, 59 N. Y. 611 ; *Faulkner v. Hart*, 82 id. 413 ; *Goodrich v. Thompson*, 44 id. 324 ; *Magee v. C. & A. R. R. Co.*, 45 id. 514, 522 ; *Norton v. Western R. R. Co.*, 15 id. 444, 447 ; *P. & A. R. R. v. Derby*, 14 How. [U. S.] 468 ; *Perkins v. N. Y. C. R. R. Co.*, 24 N.

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Y. 200-201; 5 Ind. 339; 30 Ill. 9; 3 Lans. 106; 23 N. Y. 344; *Hooper v. L. & N. W. R. R.*, 43 L. T. R. [N. S.] 570; *The Elvira Harbeck*, 2 Blatchf. 336; *Hickok v. R. R.*, 37 Conn. 281; *Pickford v. R. R. Co.*, 12 M. & W. 766, 771-2.) The apparent authority of the defendant's agent is clearly established by the evidence. (*Jordan v. Fall River R. R.*, 6 Cush. 69; *Hickok v. R. R.*, 31 Conn. 281.) A clear *prima facie* case of such authority was made out, which the defendant was bound to meet. The authority of the agent to bind the carrier is always a question of fact. (*Thomson v. Wells*, 18 Barb. 500.) Railroad tickets and baggage checks are mere tokens or vouchers. (*Quimby v. Vanderbilt*, 17 N. Y. 306; *Nelson v. R. R.*, 7 Hun, 140, 142; *Van Buskirk v. Roberts*, 31 N. Y. 661, 666, 669, 672-3; 54 id. 515; 4 Bosw. 225; 31 Conn. 281.) The plaintiff was under no obligation to examine the checks to ascertain whether they contained any thing inconsistent with his agreement with the baggage-master. (*Rawson v. R. R.*, 48 N. Y. 212; *Door v. N. J. S. N. Co.*, 11 id. 485.)

Frank Loomis for respondent. The request of the plaintiff of the baggage-master, for checks the defendant was not bound to give, and his acceptance of the checks given him by the baggage-master, the route by which they would take the baggage being indicated thereon, charged the plaintiff with notice of that route (*Hill v. S. B. & My. R. R. Co.*, 73 N. Y. 351); and precludes him from seeking a recovery, except as against the company in whose custody the baggage was when it was injured. (*Fairfax v. N. Y. C. & H. R. R. Co.*, 73 N. Y. 167.) When the plaintiff went to the defendant's baggage-room he had a subsisting contract with the defendant to carry him, his wife and his two children and their ordinary baggage safely from New York to Niagara Falls, and there, at its station, on the arrival of the train, to deliver to the plaintiff the baggage, and plaintiff could demand nothing more. (Laws of 1847, chap. 272, § 6; Laws of 1850, chap. 140, § 37.) An agent is held as to third parties, to have the authority ac-

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tually conferred upon him, or implied from a characteristic designation, or from such sanctioning of his conduct as implies the nature of his authority. (*Thurman v. Wells*, 18 Barb. 500, 519.) The baggage-master had neither express, implied or apparent authority to do as the plaintiff requested. (*Wait v. A. & S. R. R. Co.*, 5 Lans. 475; *Blumantle v. F. R. R. Co.*, 127 Mass. 322.)

ANDREWS, J. The plaintiff failed to establish a contract by the defendant to carry him and his baggage from New York to New Orleans, *via* the "Mobile route" from Niagara Falls, as alleged in the complaint. On the contrary the proof conclusively negated the existence of a through contract by the defendant. The only contract between the plaintiff and defendant for the carriage of the former was made at Niagara Falls, about July 1, 1876, through the purchase there by the plaintiff, of tickets for himself and family over the defendant's road from Niagara Falls to the city of New York, and from the latter place to Niagara Falls on their return. The plaintiff at that time held return tickets from Niagara Falls to New Orleans by the Mobile route, purchased at New Orleans. There is no evidence that the defendant was interested in that route. It appeared that this route in connection with the defendant's road formed a continuous line of railroad between New York and New Orleans, but no community of interest between the defendant and the several corporations operating the lines of road embraced therein was shown.

The case, however, was not disposed of on the trial, upon any question of pleading. The facts were shown without objection, on the ground of variance. The nonsuit was granted upon the ground that the facts proved did not disclose a cause of action, and this is the only question presented on this appeal.

The essential facts may be briefly stated. The plaintiff on the 17th of August, 1876, having the tickets above stated, entitling him and his family to be carried from New York to New Orleans, *via* the Mobile route from Niagara Falls, presen-

ted them with his baggage to the baggage-master at the baggage-room of the defendant in the city of New York, and requested the baggage-master to check the baggage from New York to New Orleans by the route indicated by the tickets. The baggage-master asked to see the tickets, examined them and thereupon gave the plaintiff two checks for his trunks from New York to New Orleans. The plaintiff took the checks, put them in his pocket without examining them, and afterward gave them to his wife for safe-keeping. On the same day the plaintiff and his family commenced their return journey to New Orleans on the route indicated by the tickets, and when near New Orleans the checks were handed to the agent of a transfer company, with directions to deliver the baggage at the plaintiff's residence in that city. It was then ascertained that the checks were those used for baggage sent from New York to New Orleans *via* what is called the "Great Jackson" route from Niagara Falls. It subsequently transpired that the plaintiff's baggage was in fact sent from Niagara Falls over the route indicated by the checks, and that while in transit, was substantially destroyed by an accident at Tugaloo, Miss. The case contains a printed *fac simile* of the checks. The words "New Orleans and New York" are distinctly shown on the checks, and at the bottom are numerous letters and abbreviations which, as explained, indicate the several roads constituting the "Great Jackson" route from New York to New Orleans.

The delivery of the baggage by the defendant at Niagara Falls to the agents of the Jackson route, was in direct violation of the plaintiff's instructions and of the undertaking of the baggage-master on receiving the baggage. The acts and conduct of the latter on that occasion are consistent only with the theory that he assented to the plaintiff's request to check the baggage by the Mobile route, and through ignorance, negligence, or mistake, checked it by the Jackson route. If the undertaking of the baggage-master, to check the baggage by the Mobile route was in law or in fact the undertaking of the defendant, its liability for the loss of the baggage, in the ab-

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sence of contributory negligence on the part of the plaintiff, is settled by authority. The agreement to check the baggage by the Mobile route included an agreement *ex vi termini* to deliver it at the end of its road to the next succeeding carrier on that route. If such delivery had been made, the defendant's responsibility would have terminated. But having misdelivered the baggage contrary to the agreement, to another carrier, it remained liable as insurer for any injury or loss occurring on the route upon which the baggage was diverted (*Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 610; *Condict v. Grand Trunk R. Co.*, 54 id. 500, and cases cited.)

The defendant rests its defense to the action on two grounds, *first*, that the agreement of the baggage-master to check the baggage by the Mobile route was unauthorized and did not bind the defendant; and *second*, that the omission of the plaintiff to examine the checks was contributory negligence which prevents a recovery.

It will be useful in determining the principal question, to refer to the obligation which a carrier of passengers by rail assumes on the sale of a passage ticket, in respect to the personal baggage of the passenger. The carriage of the baggage of the passenger, under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger, and the duty arises on the part of the company to carry the baggage of the passenger, as incident to the principal contract without any specific agreement or separate compensation. The obligation, moreover, includes, as in the case of merchandise, an obligation to deliver the baggage carried. (*Cole v. Goodwin*, 19 Wend. 251; *Powell v. Myers*, 26 id. 591.) There arises therefore on the sale of a passenger ticket a contract to carry the person and the baggage of the passenger between the points indicated, on the road of the company issuing it, and to deliver the baggage at the end of the route to the passenger or his duly authorized agent. In this State a statutory duty is also imposed upon railroad companies receiving baggage for transportation, to affix to each

parcel a metallic check with numbers stamped thereon, and to deliver a duplicate to the passenger or owner. (Laws of 1847, chap. 272, § 6; Laws of 1850, chap. 140, § 37.) These statutory provisions prescribe the duty of railroads within this State, receiving baggage to be transported to points on the line of the road receiving it, and impose no obligation to check baggage beyond such line, but they contain, so far as we know, the first legislative recognition of a system which has expanded to meet the growing demands of the business, so that the checking of baggage has become the common incident of railroad passenger transportation in the United States. Personal delivery of baggage to the passenger at the end of the transit on a particular road, has to a great extent been superseded in case of through passengers having tickets for an entire route owned and operated by separate but connecting lines, by the custom of the first carrier checking the baggage to the final destination and delivering it at the end of his route to the next succeeding carrier, who in turn delivers to the next carrier, and so on *toties quoties* until it reaches the possession of the last carrier on the route. This general practice is a matter of common observation and experience, and has so become a part of the common knowledge of the community that courts may take judicial notice of its existence. It has been generally adopted by reason of its manifest utility and convenience, and the practice promotes the mutual interests of the railroads and the public. It may not be, and probably is not a practice obligatory upon railroad companies, and mutual arrangements between connecting roads must be made before the practice can be adopted; but the fact remains, that in most cases such arrangements are perfected, and a traveler having a through ticket over connecting lines may reasonably expect, on delivering his baggage to the first carrier, to receive a check relieving him from the necessity of seeing to its transfer to the several successive roads in the line of travel.

We come now to the question as to the authority of the baggage-master to bind the defendant by an agreement to check the plaintiff's baggage by the Mobile route.

There is no evidence of the actual authority, oral or written, conferred upon the baggage-master upon his appointment. Whether in fact he had authority to check baggage over the Mobile route, or whether the defendant was accustomed to check baggage over that route, does not appear. He had authority to check over the Jackson route, as is inferable from his being trusted with checks over that line. But the authority of an agent may be implied in many cases from his official designation, the position in which he is placed, and the duties which naturally appertain thereto. Parties may deal with the agents of corporations upon the presumption that they possess the powers usually assigned to the office they hold (2 Kent's Com. 350, note, and cases cited), and the principal is bound as to third persons acting in good faith, by the act of an agent within his apparent authority, although in the particular instance it was unauthorized. In considering the inference to be drawn as to the authority of the baggage-master in this case from his official designation, and from the fact that he was acting as the agent of the defendant in receiving baggage of passengers, the jury was entitled to take notice of the usual methods of railroad transportation. The contract to carry the baggage of passengers as incident to the contract to carry the person, does not become defined as to the particular baggage, its amount, or other incidents, until the baggage is delivered to the baggage-master. So also in respect to checking baggage, the arrangement, from the nature of the business, must, in large places at least, be made with the baggage-master. It would be impracticable in the city of New York, for example, to arrange the details for the carrying of baggage, with the ticket agent. Such details are left, as they necessarily must be, to be subsequently arranged between the passenger and baggage-master at the very time of delivering the baggage. The passenger can ordinarily deal with no one else in respect to them. He may not know, or if he knows, he would not ordinarily be able to find the superior agents of the corporation. The passenger has, we think, the right to assume that the baggage-master possesses

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the requisite authority to make all ordinary and usual arrangements with passengers in respect to the transportation of baggage. If a question arises as to checking baggage beyond the line of the road receiving it, the practice of the company is presumably known to the baggage-master, and he is practically the only person to whom the inquiry can be addressed. It would produce great inconvenience if it should be held that the baggage-master did not represent the company in respect to the ordinary incidents of baggage transportation. It could not be claimed that a baggage-master, in the absence of special authority, could bind the company by a contract to carry baggage beyond the terminus of the road, or agree upon special or unusual modes of delivery, as to deliver at a place other than the depot of the company, or (perhaps) to a specified person at the terminus of the route, other than the owner. But it is we think within the apparent scope of a baggage-master's employment, when asked by a passenger whether the company checks baggage over a route indicated by his passage tickets, to answer the question and to bind the company by checking it over connecting roads. In this case the request to check over the Mobile route was made to the baggage-master and assented to by him, and he assumed to give checks in accordance with the request. This constituted, we think, an agreement binding on the company, and unless the plaintiff's omission to examine the checks was contributory negligence, we are of opinion that the nonsuit was erroneous. The primary purpose of giving a passenger a duplicate check is to enable him to identify and claim his baggage at the end of the route. It has never, we think, been regarded as embodying the contract of carriage, but only as a voucher or token for the purpose mentioned. (See *Quimby v. Vanderbilt*, 17 N. Y. 306; *Van Buskirk v. Roberts*, 31 id. 661; *Blossom v. Dodd*, 43 id. 264; 3 Am. Rep. 701; *Rawson v. Penn. R. R. Co.*, 48 N. Y. 212.) The plaintiff had a right to repose upon the representation of the baggage-master, without examining the checks. It is, however, a conclusive answer in this case to the claim to take

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the question of contributory negligence from the jury, that an inspection of the checks would not be likely to apprise a person not an expert or familiar with the roads making up the lines from New York to New Orleans, that a mistake had been made. The plaintiff was at least entitled to have the question of negligence on his part submitted to the jury.

For the reasons stated we think the nonsuit was erroneous, and the judgment, therefore, should be reversed and a new trial ordered.

All concur, except EARL, J., not voting.

Judgment reversed.

In the Matter of the Application of THE NEW YORK, WEST SHORE AND BUFFALO RAILWAY COMPANY to Acquire Title to Lands of ELIZABETH WALSH and Others.

94	287
130	606
94	287
151	86

An order of General Term, vacating the report of commissioners appointed in proceedings by a railroad corporation to acquire title to lands and the confirmation thereof, and directing a new appraisal before new commissioners, is not reviewable here.

The General Term, however, has no power on appeal by the company from the order of confirmation to award costs against the owners.

Where costs are awarded, so much of the General Term order is reviewable here; but this does not confer jurisdiction to review the whole order.

Bergen v. Carman (79 N. Y. 146) distinguished.

As to whether the general provisions applicable to appeals to this court extend to condemnation proceedings under the Railroad Act, *quere*.

Upon motion to dismiss an appeal by a railroad company to the General Term from an order of Special Term confirming the report of commissioners appointed to condemn certain lands under water in the Hudson river, it appeared that under former proceedings the company had obtained possession and begun the construction of an embankment; these proceedings were subsequently annulled and the present proceedings instituted. On application of the company an order was granted allowing it to continue in possession until the final conclusion of the new proceedings, but requiring it to keep open a gap in the embankment for the benefit of the land-owners. The order confirming the commissioners' report provided that, on payment of the sums awarded, the company have

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full possession, and annulled all orders inconsistent with such possession. The company paid the awards and immediately closed up the gap. *Held*, that by so doing it did not waive its right of appeal from the order; that independent of the order, on payment of the awards, the condemnation was complete and final, the company was entitled to take full possession, the owners were divested of all estate and interest (§§ 17, 18, chap. 140, Laws of 1850), and nothing could be reviewed upon the appeal but the amount of the awards; and so, the company did not avail itself of any benefit conferred by the order appealed from, which should preclude it from appealing.

(Argued December 12, 1883; decided January 15, 1884.)

APPEAL by Elizabeth Wright and other land-owners from order of the General Term of the Supreme Court, in the second judicial department, made May 17, 1883, which vacated an order of Special Term, confirming the report of commissioners appointed herein to appraise the compensation to be paid said land-owners for the lands sought to be condemned in these proceedings for the use and benefit of the New York, West Shore and Buffalo Railway Company, which also vacated and set aside the report of the commissioners and appointed new commissioners, and awarded costs to said company against the land-owners.

The lands sought to be condemned lie under the waters of the Hudson river.

The facts so far as material are stated in the opinion.

Samuel Hand for appellant. The order of the General Term was a final order, and, therefore, appealable, because it awarded costs absolutely to the company against the owners. (*Bergen v. Carman*, 79 N. Y. 146.) The intermediate order denying the motion to dismiss the appeal is appealable, because it was made in a special proceeding, involves a substantial right, does not rest in discretion, and does not arise on conflicting evidence. (Code, § 190, subd. 3; *id.*, § 1339; Laws of 1850, chap. 140, § 18.) The proposition that railroad appraisal cases are not consistent with the uniform and well-settled practice of this court, in entertaining appeals from orders appointing commissioners of appraisal is untenable. (77 N. Y. 248; 89 *id.* 453;

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Code of Civ. Pro., §§ 1337, 1339.) A party who obtains a benefit under an order and accepts the benefit or receives the advantage, shall thereafter be precluded from having the order reviewed on appeal. (*Knapp v. Brown*, 45 N. Y. 207; *Bennett v. Van Sickle*, 18 id. 481; *Vail v. Remsen*, 7 Paige, 206; *Dambman v. Schulting*, 6 Hun, 29; *Glacken v. Zeller*, 52 Barb. 147; *Platz v. City of Cohoes*, 8 Abb. N. C. 392; *Genet v. Davenport*, 59 N. Y. 648.) Where the General Term makes an order imposing the payment of money, which order it is not authorized by law to make, such order involves a substantial right, not resting in discretion, and is appealable to this court. (*Newton v. Russell*, 87 N. Y. 527; *Bergen v. Carman*, 79 id. 146)

M. H. Hirschberg for respondent. The orders are not reviewable by this court. (Laws of 1850, chap. 140, §§ 17, 18; *Matter of N. Y. C. R. R. Co. v. Marvin*, 11 N. Y. 276.) The statute gives no appeal to this court. (*Matter of N. Y. C. & H. R. R. Co. v. Cunningham*, 64 N. Y. 60; *N. Y. C. R. R. Co. v. Marvin*, 11 id. 276; *Matter of Canal St.*, 12 id. 406; *In re O. & M. R. R. Co.*, 40 How. Pr. 335; *Matter of D. & H. C. Co. v. Adams*, 69 N. Y. 209; *People ex rel. S. & U. H. R. R. Co., v. Betts*, 55 id. 600; *In re Appl'n Kings Co. El. R. R. Co.*, 82 id. 95; 20 Hun, 217; 64 N. Y. 60; 11 id. 276; 12 id. 406, 413; 70 id. 327, 359.) Even under the provision of the Code, no appeal lies from these orders. The proceedings are special, and the jurisdiction of this court is limited in special proceedings to appeals from final orders. (Code of Civ. Pro., § 190, subd. 3; *Roe v. Boyle*, 81 N. Y. 305.) The decision, as appears by the opinion, was based solely on the ground that the damages awarded were excessive; and this court has no jurisdiction to review such determination. (*Snebley v. Conner*, 78 N. Y. 218; *Matter of Kings Co. El. R. R. Co.*, 82 id. 95; *Fradenburgh v. Biddeleton*, 85 id. 196.) By judgment of law the proceedings before the commission on the first hearing were without authority and were void, and it was the same as if no appraisal had at

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any time been made. (*White B'k v. Nickols*, 64 N. Y. 65.) Errors of law on the part of the commissioners, questions of admission of evidence, affidavits to contradict or impeach the truth of facts contained in the report, etc., cannot be considered on the motion to confirm. (*N. Y. & E. R. R. Co. v. Corey*, 5 How. 177; *N. Y. & E. R. R. Co. v. Coburn*, 6 id. 233; *R. & S. R. R. Co. v. Budlong*, id. 467; *R. & G. V. R. R. Co. v. Beckwith*, 10 id. 168; *Matter of N. Y. & J. R. R. Co.*, 21 id. 134.) The confirmation of the commissioners' report was a completion of the proceedings by which the company was authorized "to enter upon, take possession of, and use the land for the purposes of its incorporation." (*N. F. & L. O. R. R. Co. v. Hotchkiss*, 16 Barb. 270; *Crowner v. W. & R. R. R. Co.*, 9 How. Pr. 457; *Dyett v. Pendleton*, 8 Cow. 327.) The appeal was not waived by compliance with the order to confirm, and filling up the "gap" or passage-way. (*Benkard v. Babcock*, 27 How. 391; *S. C.*, 17 Abb. [N. S.] 421; *People v. Stevens*, 52 N. Y. 306.) The commissioners are bound to be guided in their proceedings by the established rules of evidence, a technical error in the report may be disregarded, but otherwise, if the error be of such a character as to show the commissioners have mistaken the principles that should govern the appraisal and that appellant may have been wronged by it. (*Colby's Railroad Law*, 175; 16 Barb. 100.) The court below properly directed a new appraisal before new commissioners. (*N. Y. & E. R. R. Co. v. Corey*, 5 How. 177; *N. Y. & E. R. R. Co. v. Coburn*, 6 id. 223; *Matter of N. Y. C. R. R. Co. v. Marvin*, 11 N. Y. 276.)

RAPALLO, J. By the confirmation at Special Term of the report of the commissioners, and the entry and recording of the order reciting the proceeding, and the payment of the compensation directed to be paid to the land-owners, the railroad company became entitled, under the statute, to take possession of and use the land for the purposes of its incorporation, and all persons who were parties to the proceeding were divested

and barred of all right, estate and interest in the land during the corporate existence of the company.

But, notwithstanding the change of title thus effected, and the taking possession by the railroad company, either party might under the provisions of the statute obtain a review, by the Supreme Court, of the appraisal of the commissioners. This review did not affect either the title or right of possession of the railroad company, but only the amount paid by it. If in the judgment of the court it was excessive or insufficient, the court was empowered to direct a new appraisal before the same or new commissioners, in its discretion. If by the second appraisal the damages should be reduced, the company would be entitled to have the difference refunded. If the amount should be increased, the company would be bound to pay the increased amount, and it would become a lien upon the land, the title to which had already become vested in the company. (Laws of 1850, chap. 140, §§ 17, 18.)

The court having in this case, on the appeal of the railroad company to the General Term, from the order confirming the report of the commissioners, exercised the discretion conferred upon it by the statute, by vacating the award of the commissioners and the confirmation thereof, and directing a new appraisal before new commissioners, its determination, in that respect, cannot be reviewed by this court. It involves simply questions of fact and matters of discretion, of which this court cannot take cognizance.

It is claimed on the part of the appellants that inasmuch as the order of the General Term awards costs against them absolutely, it is appealable in that respect, and consequently the whole of the order is reviewable here, and the case of *Bergen v. Carman* (79 N. Y. 146) is cited as an authority for that proposition.

Conceding that the part of the order which awards costs, and the judgment entered thereon, are appealable if the award of costs was contrary to law, or unauthorized by law, it does not follow that the other portions of the order are appealable, and *Bergen v. Carman* is not an authority to that effect. The ob-

jection in that case was that the order appealed from sent the case back to the referee for a further hearing, and therefore, was not final. The difficulty in this case is that the order, in so far as it directs a new appraisal and the appointment of new commissioners, depended on questions of fact and was discretionary, so that, even if the general provisions applicable to appeals to this court extend to condemnation proceedings under the railroad law (which is controverted), the questions are not of such a nature that they can be reviewed here. The award of costs cannot confer jurisdiction over those questions.

The next question which arises is on the order of the General Term denying the motion of the land-owners to dismiss the appeal from the order confirming the report of the commissioners.

It may be assumed that if, after the award of the commissioners had been confirmed, the railroad company had entered into a valid agreement with the land-owners to abide by the award and not to appeal from the confirmation thereof, or had done acts which in law had constituted a waiver of the right to appeal from such confirmation, the General Term could and ought to have enforced such agreement or waiver, and that its refusal to do so would present a question of law reviewable here. It is not necessary to decide that question now, because we are of opinion that no waiver of the right to appeal to the General Term was shown.

The facts claimed to constitute a waiver are that, under a former proceeding to acquire title to the lands in question, the company had obtained possession and begun the construction of an embankment and road-way thereon. Those proceedings were subsequently reversed and annulled, pursuant to the judgment of this court, and a new proceeding (the present one) was instituted. The company thereupon applied to the court, under section 21 of the Railroad Act, for an order allowing it to continue in possession until the final conclusion of the new proceeding, the compensation awarded in the first proceeding having been already deposited. The order asked for was granted, but a provision was inserted in it for the benefit of the land-owners,

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requiring the company to leave and keep open a gap in their embankment, through which vessels could pass from the river to the brickyards of the land-owners. This order was dated July 22, 1882. Commissioners were appointed under the second proceeding, August 29, 1882. Their report was made November 24, 1882, and was confirmed December 4, 1882, and the order of confirmation, being the order from which the appeal was taken to the General Term, contained a provision that, on payment or deposit of the sums thereby awarded to the land-owners for their compensation, the railway company have full and complete possession of the lands, and that any and all orders theretofore granted, inconsistent with such possession, be annulled and set aside. The company thereupon paid the awards to the land-owners, and immediately thereafter closed up the gap which it had left open, pursuant to the order of July 22, 1882, and on the 21st of December, 1882, it appealed to the General Term for the purpose of reviewing the amount of the awards.

The motion at General Term to dismiss the appeal was made upon the ground that, by thus closing the gap, the company had taken a benefit awarded to it by the order of confirmation appealed from, viz. : that it had availed itself of that part of the order which gave it full possession of the premises and annulled all former orders inconsistent with such possession, and that, by thus availing itself of that provision of the order of confirmation, it had precluded itself from appealing from any part of the order. We think that the motion to dismiss was properly denied. The right of the company to take full possession of the premises, and use them for the purposes of its incorporation, on paying the awards, was conferred upon it by the statute, independently of the order of the court, and by the same statute the land-owners, who were parties to the proceeding, were divested and barred of all estate, right and interest in the land which could interfere with such use. The company did not after that time hold possession under the order of July 22, and ceased to be subject to the condition imposed by that order. It held, by virtue of the condemnation of December

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4, 1882, the payment of the awards, and the right which the statute conferred as consequent thereupon. By exercising this right and filling up the gap, it did not avail itself of any benefit conferred by the order appealed from, which should preclude it from appealing. The condemnation was complete and final; nothing could, thereafter, be reviewed upon the appeal but the amount of the award, and the statute very clearly provides that this review may be had after the awards have been paid, and the title has changed and possession has been taken.

The only point remaining to be considered is the appeal from the judgment for costs rendered by the General Term against the land-owners, on reversing the order of confirmation and appointing new commissioners, amounting to \$120.70. We are of opinion that the General Term had no power to award these costs. If the appeal to the General Term had been taken by the land-owners, and they had been defeated, it may be that the court could, in its discretion, have compelled them to pay the costs to which they had subjected the company by such an appeal. But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the land-owners, and to acquire their land against their will. In such a case to compel the land-owners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the land-owners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it. In the present case the costs allowed are small compared with the amount of the award, which was \$35,500, but that can make no difference in the principle. If the company can recover against the land-owner the expenses of proceedings carried on by it for its own benefit, where the award is large, it may do the same when the award is small;

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and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole of the award. There is no warrant in the statute for awarding such costs, and if there were, it would be a violation of the constitutional right of the land-owner.

The appeal from so much of the order of the General Term as reverses the order of confirmation and appoints new commissioners should be dismissed. The order of the General Term denying the motion of the land-owners to dismiss the appeal should be affirmed. The order of the General Term, in so far as it awards costs to the company, and the judgment for such costs should be reversed. Neither party to have costs against the other on the appeals in this court.

All concur.

Ordered accordingly.

OLIVER W. MARVIN, Appellant, v. AUGUSTUS PRENTICE, Respondent.

Where premises have been conveyed absolutely to secure a loan, and because of a refusal on the part of the lender to reconvey on tender of the amount due, the borrower brings an action to compel a reconveyance, he cannot, after judgment in his favor in such an action, maintain another action to recover, as damages, the amount of a depreciation in the value of the property pending the litigation, or his costs and expenses in the equity suit; conceding an action to recover damages may be maintained, as to which *quære*, these are not proper items of damages.

As to whether the judgment in the equity suit would be a bar to an action for damages, *quære*.

(Argued November 23, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 15, 1881, which affirmed a judgment entered upon an order of Special Term setting aside a verdict for plaintiff and directing judgment for defendants.

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The plaintiff, in his complaint in this action, claims to recover damages by reason of the failure of the defendant to reconvey to him certain real estate, which he, the plaintiff, had previously conveyed to one Jeremiah Harris at the request of the defendant. It is alleged that the conveyance, by the plaintiff to Harris, was made for the purpose of obtaining a loan of \$2,000 from the defendant; that the plaintiff was to give the defendant a warranty deed of said lot of land for the nominal consideration of \$6,500, and the defendant to advance \$2,000 on account thereof, the same to be secured by bond and mortgage on said lot, the bond to be guaranteed to the satisfaction of the defendant, and for the remaining \$4,500 the defendant was to give to the plaintiff a bond and mortgage payable after his title to said lot, which was in dispute, had been perfected, it being understood that the deed was to be held merely as security, and the property reconveyed to plaintiff upon the payment of such sums as might be loaned or advanced, together with such further sum, beyond legal interest, as might be agreed upon; that the bond and mortgage were executed accordingly, with the proper guaranty, the money advanced, and a deed of the lot executed by plaintiff to Jeremiah Harris, the appointee of the defendant, but whom plaintiff never knew personally, and a bond and mortgage executed by Harris and wife to the plaintiff for \$4,500, which were never delivered to him, but were delivered to and retained by the defendant, and on the next day Harris and wife conveyed the premises to the wife of the defendant for the nominal consideration of \$7,000; that on plaintiff's title to the lot being settled, he applied to the defendant for a reconveyance of the same, in accordance with the understanding in regard thereto, whereupon the defendant demanded the sum of \$8,500; that not long thereafter defendant advanced the further sum of about \$2,000 on account of the said bond and mortgage for \$4,500; that in October, 1871, plaintiff applied to the defendant to redeem the said lot, and the defendant refused to carry out the agreement, stating that the lot was worth \$12,000, and that he would do nothing but pay the balance of the \$4,500

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bond and mortgage, deducting therefrom a small sum for taxes, assessments, etc., which balance plaintiff, on or about the 12th of January, 1872, accepted under protest, and with notice to the defendant that he did not intend thereby to waive any of his legal rights in the premises; that at various times during the months of January and February, 1872, plaintiff offered to pay defendant the sum of \$8,500 for a reconveyance of said lot, but the defendant always refused to reconvey. The complaint also alleges that in March, 1872, the plaintiff commenced an equity action in the Supreme Court of this State, against the defendant and others, to have the said conveyance made by the plaintiff to the said Harris declared to have been given as security for a usurious loan, and that it be surrendered and canceled, etc.; that the said action was defended and tried, and on or about the 15th day of June, 1876, a decree was duly entered declaring the transaction to be a loan and not a sale and void for usury, and setting aside the said conveyance and directing the same to be canceled of record; that upon appeal to the General Term the judgment was affirmed, so far as it declared the transaction to be a loan and not a sale, and reversed so far as it was declared to be usurious, and directed that, on the repayment to said defendant of the sum of \$6,500, with interest thereon, on or before the 1st day of April, 1878, the defendant and his wife should reconvey said premises to the plaintiff, etc. The complaint also contained allegations as to the value of the premises, and averred that, by reason of the refusals of the defendant to accept plaintiff's offers of \$8,500 for a reconveyance, he was compelled to commence the action in equity referred to, and was put to large expense and disbursements thereby. That by reason of the depreciation in the value of property, the premises were not, at the time of the entry of the decree by the General Term, and are not now, worth more than about \$5,000, while the said decree required the payment of about \$9,500 in order to redeem the premises. The answer of the defendant sets up several defenses, and among others, that in the equity action the plaintiff sought to have the conveyance set aside for

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usury, and an alternative judgment for damages; that the plaintiff had never availed himself of the permission to redeem, and that neither party was at liberty to aver or prove a state of facts other than the one established by the judgment of the court in the equity action. Also, that the cause of action set forth in the complaint had been adjudicated and decided in the equity action. Further facts appear in the opinion.

Henry C. Wilcox for appellant. This action was not barred by the judgment in the former action. (*Castle v. Noyes*, 14 N. Y. 329; *Casler v. Shipman*, 35 id. 533; *McKnight v. Dunlap*, 4 Barb. 36; *Gregory v. Burrill*, 2 Edm. Ch. 416; *Dalton v. Smith*, 86 N. Y. 176; *Perry v. Dickinson*, 85 id. 345, 347, 349, 352; *Palmer v. Hussey*, 87 id. 303; *Smith v. Smith*, 79 id. 634; *Stowell v. Chamberlain*, 60 id. 272.) The present action is to recover damages sustained by the wrongful acts of the defendant, suffered mainly in the depreciation of the value of the real estate, which plaintiff claimed to own, and in order to prove that the property was actually owned by plaintiff, it was necessary to establish that the deed from Marvin to Harris was simply a mortgage, and that could only be done in equity. (*Horn v. Ketteltas*, 46 N. Y. 610.) It was necessary for plaintiff to establish his title to the property before he could maintain any action for damages. (*Hughes v. Vermont Copper Co.*, 72 N. Y. 207; *Bradley v. Aldrich*, 40 id. 504; *Arnold v. Angell*, 62 id. 508; *Worrall v. Munn*, 38 id. 137; *Sanger v. Wood*, 2 Johns. Ch. 421.) As no objection was made to the proof of the amendment to the complaint, and as such amended complaint was left out of the judgment-roll on the former action by mistake, and as subsequently defendant himself put in evidence the roll on Judge VAN BRUNT's decision, which contained the complaint as amended, plaintiff was at liberty to show that there was an amendment of the complaint. In any event oral testimony would be competent under the circumstances. (*Smith v. Smith*, 79 N. Y. 634.) The cause of action now before the court could not have been joined in the former action with the cause of action then set forth. (Code

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of Proc., § 167; *Gardiner v. Ogden*, 32 N. Y. 327, 340.) Even if Marvin did make an assignment to Willcox of his claim against Prentice, after commencing his suit, the action was properly continued in his name. (1 E. D. Smith, 427; 1 Bosw. 569.) The receiver of all plaintiff's property appointed in supplementary proceedings was not a necessary party to this action. (*Glenville Woolen Co. v. Ripley*, 43 N. Y. 206.) The courts will not leave an owner remediless under the circumstances proved. (*Meehan v. Forrester*, 52 N. Y. 277; *Enos v. Smotherland*, 11 Mich. 538; Jones on Mortgages, § 341.)

A. J. Vanderpoel for respondent. Under the state of facts established by the judgment in the equity action, if the defendant Prentice refused to reconvey to the plaintiff the property in question, the plaintiff had his choice of two remedies: To compel a reconveyance of the land from Prentice or his wife, or to claim compensation from Prentice for a refusal to reconvey. (Jones on Mortgages, §§ 341, 342; *Gardner v. Ogden*, 22 N. Y. 327, 331; *Meehan v. Forrester*, 52 id. 277; *Rodermund v. Clark*, 46 id. 354, 357; *Kennedy v. Thorp*, 51 id. 174; *Steinbach v. Relief Ins. Co.*, 77 id. 498; *Fields v. Bland*, 81 id. 239; Bigelow on Estoppel [3d ed.], 562.) Where a party has two or more remedies for the same wrong, in which the measure of damages might be different, electing one and pursuing it to judgment is a bar to any other. (*Walsh v. Canal Co.*, 59 Md. 423; *Beall v. Peane*, 12 id. 566; *Ware v. Percival*, 61 Me. 391; *Bunker v. Truffs*, 57 id. 417; *Sweet v. Brackley*, 53 id. 346; *Holbrook v. Foss*, 27 id. 441; *Goodrich v. Yale*, 97 Mass. 15; *Bennett v. Hood*, 1 Allen, 47; *Smith v. Way*, 9 id. 472; *Warren v. Cummings*, 6 Cush. 103; *Norton v. Doherty*, 3 Gray, 372; *Thompson v. Howard*, 31 Mich. 309; *Nield v. Burton*, 49 id. 53; *Bolles v. Duff*, 43 id. 469.) The claim of the plaintiff is *res adjudicata*. (*Jackson v. Crafts*, 18 Johns. 110; *Kortright v. Cady*, 21 N. Y. 243.) The judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties depending on the same question,

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although the subject-matter of the second action be different. (*Doty v. Brown*, 4 N. Y. 71; *Steinbach v. Relief Ins. Co.*, 77 id. 498, 501; *Jordan v. Van Epps*, 85 id. 436; *Embury v. Conner*, 3 id. 511, 522; *Tuska v. O'Brien*, 68 id. 446, 449; *Castle v. Noyes*, 14 id. 329; *Smith v. Smith*, 79 id. 634; *Tompkins v. Hyatt*, 28 id. 347.) It cannot be pretended here but that the equity court could have granted the plaintiff compensation by giving him a judgment for damages, had it seen fit so to do, and indeed ought to have done so if a reconveyance had not been decreed. (*Gardner v. Ogden*, 22 N. Y. 327, 351; *Barlow v. Scott*, 24 id. 40; *Bidwell v. Astor Mut. Ins. Co.*, 16 id. 263, 267.) The claim that plaintiff amended his complaint in the equity action by striking out the claim for damages will not avail him. (49 N. Y. 626, 631; *McKnight v. Dunlop*, 4 Bart. 36; *Gregory v. Burrall*, 2 Edw. Ch. 416; *Casler v. Shipman*, 35 N. Y. 533, 545; *Perry v. Lewis*, 49 Miss. 443.) This action is within the statute of frauds and void. (*Boyd v. Stone*, 11 Mass. 342; *Dung v. Parker*, 52 N. Y. 494; *Levy v. Brush*, 4 id. 589; *Wheeler v. Reynolds*, 66 id. 227; *Cagger v. Lansing*, 43 id. 550; *Wright v. Weeks*, 25 id. 153.) A court of equity has the exclusive right to determine costs in a suit before it, and that an action at law cannot be maintained to recover expenses incurred in defending even a vexatious suit. (*Leonard v. Freeman*, Col. & C. Cases, 491; Old Code, § 306; 3 Wait's Pr. 471.) Costs are merely an incident to the subject-matter. (*Bendit v. Annesley*, 42 Barb. 192.) It would have been competent for the defendant to have offered the record in the former suit in evidence, even if the plaintiff had not offered a part thereof. (*Krekeler v. Ritter*, 62 N. Y. 372.)

MILLER, J. The principal question, upon which this case seems to have been determined, was whether the present action was barred by the judgment in the equity action which was set forth in the complaint. An examination of this subject is rendered unnecessary, as our determination of another question

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disposes of the case. That question is as to plaintiff's claim for damages, for even if it may be assumed that, in a proper case; an action might be maintained to recover damages, caused by reason of the fraudulent and wrongful acts and conduct of a party in obtaining a conveyance of lands from another, it is difficult to see what legitimate damages were shown upon the trial which entitled the plaintiff to a judgment. The damages which were assessed by the jury, and which were included in the verdict directed by the court, consisted of the difference between the amount of the loans and the interest thereon from the time of making the same, and the time when the defendant refused to reconvey, and the market value of the lot at the latter time, and the counsel fees incurred by the plaintiff in the equity suit brought by him against the defendant and others. Plaintiff was thus allowed to recover, as damages, for the depreciation of the real estate. Neither of the items mentioned was the necessary and legitimate result of the wrongful acts of the defendant, and the plaintiff was not entitled to recover for the same, as damages, in this action. He might have brought an action of ejectment to recover the land after tendering the amount due on the mortgage, and, as parol evidence is admissible to prove that an instrument, absolute on its face, was intended as a mortgage, if this was established the plaintiff would have been entitled to recover, and the damages would have been the value of the use of the premises and not the depreciation of the land. He might also have recovered for waste or trespass, but there is no principle upon which depreciation of the value of land constitutes an item of damages in such a case.

The same rule is applicable to the case now considered, and no authority is cited which sustains a recovery for depreciation under circumstances like those which are here presented. It is difficult to see upon what ground any such rule can be upheld. If the plaintiff had held the property when it was at its highest value, it is by no means certain that he would or could have sold the same. If he had not sold it at the time of its highest value the depreciation could not have injured him, and he would not have sustained any loss by reason thereof. To up-

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hold the rule of damages which prevailed in this case we must assume that, if the plaintiff had held the property at the time when it was of greatest value, he would have had an opportunity to sell, and would have sold the same at the highest price. This is not the legitimate inference to be derived from the facts presented, and the assessment of damages in this case arising from a depreciation of the value of the land was clearly unauthorized and erroneous.

In regard to the costs or counsel fees, if the action had been in ejectment to recover the land, all the costs the plaintiff would be entitled to would be the costs of the action, and no reason is shown why the same rule should not apply in this case. Costs usually are but an incident of the litigation, and to be disposed of therein, and not generally recoverable as damages in another action.

Without passing distinctly upon the question as to whether such an action as is here presented could be maintained where actual damages are shown, it is very clear that the damages claimed and allowed were unauthorized and without precedent.

It follows that the order of the judge setting aside the verdict at the Circuit in favor of the plaintiff, and the judgment of the General Term affirming the same, should be affirmed.

All concur.

Judgment affirmed.

EDWARD L. BENNETT, Respondent, v. WILLIAM WHITNEY,
Street Commissioner, etc., et al., Appellants.

One who assumes the duties, and is invested with the powers of a public officer, is liable to an individual who sustains special damage because of a neglect properly to perform those duties.

While in some cases, in order to charge an officer, upon whom is imposed the duty of keeping a street in repair, with damages resulting from a defect in the street, it is necessary to show that he had adequate means in his hands to make the repairs; such proof is not necessary in a case of *misfeasance*, i. e., when the officer has acted, but negligently, to the special injury of plaintiff.

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In an action to recover damages for alleged negligence in leaving unguarded and unlighted an opening temporarily made in a city street, the defendants, who, the complaint alleged, were officers of the city, *i. e.*, the mayor, common council and street commissioner, and by its charter charged with the duty of keeping its streets in repair, were sued in their individual names, with the title of their respective offices added; the word "as" did not precede their official designations. The complaint also averred that the mayor and common council directed the excavation to be made, and "the said street commissioner" left it unguarded; it closed with a demand of judgment "against the defendants." *Held*, that the action was against the defendants as individuals, not as officers of the city; that the addition of their official titles was simply *descriptio personæ*.

While the omission of the word "as" is not conclusive when the body of the complaint plainly discloses an official or representative capacity as the ground of the action, where its scope and averments harmonize with the omission, the action will be considered as against the defendants individually.

Beers v. Shannon (78 N. Y. 292), distinguished.

Also *held*, that a provision in the city charter (§ 6, title 14, chap. 291, Laws of 1867), declaring its officers liable for all damages "sustained by reason of willful neglect" did not take away or affect the common-law liability of an officer for simple negligence.

It seems that where a case has, by the assent of both parties, been tried upon one theory, the court will not permit it to be sent to the jury on another.

(Argued November 26, 1883; decided January 15, 1884.)

APPEAL from judgment of General Term of the Supreme Court, in the third judicial department, entered upon an order made September 24, 1880, which affirmed a judgment in favor of plaintiff against defendant Whitney, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

Alex. Cumming for appellants. This action should be construed as against the defendants officially, and the motion for a nonsuit should have been granted. (Chap. 291, Laws of 1867, tit. 4, §§ 1, 4; tit. 14, §§ 5, 6; *Cordier v. Thompson*, 7 N. Y. Weekly Dig. 474, *Beers v. Shannon*, 19 *id.* 161; *Sup'rs v. Gregg*, 66 Barb. 287; 56 N. Y. 509; 2 Abb. N. C. 240;

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Carpenter v. Stilwell, 47 N. Y. 360; *Bassett v. Fish*, 75 id. 303.) Plaintiff, having brought his action against defendants officially under the charter, cannot recover against them, or any of them, individually on common-law liability. (*Bassett v. Fish*, 75 N. Y. 303.) Defendants cannot be estopped or deprived of the full benefit of the true legal construction of the pleadings. (*Clute v. Emmerick*, 19 N. Y. S. C. 504.) The court erred in admitting the act of the common council; also in refusing to charge that the city would not be liable to defendant. (*Williams v. Pitch*, 18 N. Y. 546; *Worrall v. Parmlee*, 1 Comst. 519; *Baird v. Gillett*, 47 N. Y. 186.) The defendant is excused by the peculiar circumstances of the case for omission to prepare for a defense, and in furtherance of justice a new trial should be granted. (*Nash v. Wetman*, 33 Barb. 155.)

S. C. Millard for respondent. If an action is against a person acting in a representative capacity, it is important that the character in which he seeks to appear should be indicated by the title of the summons. (1 Wait's Sup. Ct. Pr. 470; 2 id. 373.) The word "as" in this connection is indispensable. (2 Wait's Sup. Ct. Pr. 373; *Root v. Price*, 22 How. 372; *Hallett v. Harrower*, 33 Barb. 537; 19 id. 179.) Not only the form of the summons, but the form and substance of the complaint indicates that the defendant Whitney was sought to be charged in his individual capacity. (19 Barb. 179.) Had there been any doubt or misunderstanding as to the character of the pleadings it was the duty of the court to construe them with a view to substantial justice between the parties. (Code of Civil Procedure, § 519; *Rogers v. Rogers*, 11 Barb. 595; *Spaulding v. Spaulding*, 3 How. 297; 42 N. Y. 83; 11 Abb. 206.) The court did not err in holding that the action was properly brought, and defendants properly described in both the summons and complaint. (*Rector v. Price*, 3 T. & C. 416; *Bryan v. Landon*, 3 Hun, 500; 44 N. Y. 113; 4 Hill, 630; 5 Bing. 91; 9 N. Y. 169; 1 Salk. 17; 34 N. Y. 389; 37 id. 648; 15 Johns. 250; *Johnson v. Beeden*, 47 N. Y. 130, 485.) The negligence of defendant Whitney consisted in leaving the ex-

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cavation unguarded. His obligation to avoid being negligent, and to guard the excavation upon the night of the accident, was incident to the business of making the excavation, whether in the capacity of street commissioner or as a private person. (*Shepherd v. Lincoln*, 17 Wend. 249, 251; *Hicks v. Dam*, 42 N. Y. 53; *Adsit v. Brady*, 4 Hill, 630; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 48; *Robinson v. Chamberlain*, 34 id. 339; 44 How. 5; 24 Hun, 472.) The application for a new trial upon the ground of surprise and newly-discovered evidence was properly denied. (80 N. Y. 261; *Scoville v. Landon*, 50 id. 686; *Tracy et al. v. Attmeyer*, 46 id. 598; *Lawrence v. Ely*, 38 id. 42; Code of Civil Procedure, § 1337; *Lawrence v. Farley*, 73 N. Y. 187; *Commw. Life Ins. Co. v. Bowman*, 15 Weekly Dig. 416; *Craig v. Fanning*, 6 How. 336; 10 id. 261; 54 id. 496; 30 Barb. 655; 9 Johns. 76; 7 Cow. 474.) There is no proper or sufficient proof that the witnesses, when summoned, will testify to the additional facts now sought to be supplied; their depositions are not procured; this is a security which the courts require, that the new trial shall produce some practical result. (*Grey v. Durand*, 50 Barb. 223; 42 id. 29; *Phenix v. Baldwin*, 14 Wend. 62.) The motion for a new trial should be denied on account of *laches*. (30 Barb. 655.) The affidavits must show the existence of other evidence, not available by use of reasonable diligence. (9 Hun, 269; 52 How. 325; 54 id. 492; 3 Wait's Pr. 416.) A new trial will not be granted if the proposed evidence is cumulative. (12 Abb. [N. S.] 224; 30 Barb. 655; 42 id. 284; 50 How. 59; 67 Barb. 354; 45 id. 201.)

FINCH, J. The principal dispute in this case respects the true nature and legal effect of the cause of action pleaded. The complaint is for negligence in leaving unguarded and unlighted an opening temporarily made in a city street. The defendants named are the mayor, the members of the common council, and the street commissioner of Binghamton, who are sued by their individual names, with the title of their respective offices added. The word "as" does not precede their official desig-

nations. The complaint alleges that the defendant, the mayor, and the defendants who constituted the common council, held those offices respectively, that by the city charter they were made commissioners of highways, and that it became and was their duty to keep the city streets in good order and protect any excavation made therein. It then avers that the defendant Whitney was street commissioner of the city, and had charge of the work upon the excavation from which the plaintiff's injury arose; that the mayor and common council directed it to be made, and the defendant Whitney obeyed the direction; and that the mayor and common council and "the said street commissioner, William Whitney," left the opening unguarded, and so were guilty of negligence which caused the injury. The complaint closes with a demand for judgment "against the defendants." The trial judge held, at the close of the case, that the action was against the defendants as individuals, and not as officers of the city. In this, we think, he was right. Whatever may have been some earlier doubts on the subject, it is settled in this court that one who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage by a neglect properly to perform such duties. (*Hover v. Barkhoof*, 44 N. Y. 113.) Just this cause of action the complaint sets out. It alleges the assumption of official duties and the possession of official powers by the individuals named, their failure properly to perform those duties, and a resultant injury to the plaintiff caused by such negligence. The omission in the summons of the word "as," before the official titles of the defendants, indicates that they were sued as individuals and that the addition of their names of office was but *descriptio personæ*. It may well be, as the appellant contends, that the mere omission of the word "as" in the title of the case is no longer conclusive. But that is so when the frame and body of the complaint plainly disclose an official or representative liability as the ground of action. In *Beers v. Shannon* (73 N. Y. 292), the plaintiff sued, adding after his name the words "executor," etc., but omitting the word "as." This court

held, that notwithstanding such omission, the "frame and averments and scope of the complaint" was such as to clothe him with a representative character. But nothing in the frame of this complaint so neutralizes the omission of the word "as." On the contrary its scope and averments harmonize with that omission. All that is said in it relating to official character is perfectly consistent with the claim of personal liability indicated by the title, and does not compel us to hold otherwise. Until the close of the case there seems to have been no disagreement as to this construction, but all parties conceded it, and the trial was conducted upon that understanding. What occurred was, in substance, as follows: After the plaintiff's counsel had opened his case, the defendants' counsel moved for a nonsuit upon the complaint and the opening, upon the ground that the mayor and common council could not be sued as in this case, but that the action should have been brought against the city of Binghamton. This motion did not bring to the attention of the court the question of official or individual liability as derived from the pleadings. The court did say that the action was brought "under a special clause of the city charter;" and this, as it respected the mayor and common council, in whose behalf alone the motion was made, seemed at the time the only ground of their liability. The trial proceeded until the plaintiff offered in evidence the resolution of the common council, passed September 6, 1875, to which the defendant objected, that "the action of the city of Binghamton is not binding on these men *sued here individually*." The form of the objection disclosed on the part of the defendants a perfect understanding of the meaning of the complaint. At the close of the plaintiff's evidence the motion for a nonsuit was renewed on the ground that the action could not "be maintained against the mayor and aldermen of the city of Binghamton *individually*." At this point the trial judge inquired of the plaintiff's counsel whether he sued the defendants "as individuals, or in their official capacity," and was answered that the plaintiff sued them as individuals. The court then asked the defendants' counsel if he so understood the

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complaint, and he replied that he did. Thus all ground of misunderstanding was carefully removed, and the defense proceeded to the close upon a conceded construction of the complaint. But at the end of the proofs a new counsel intervened for the defendants, and sought to open the question of construction. He asked to be relieved from the concession of his associate, as having been made through inadvertence and mistake, and insisted that only an official liability had been pleaded. The court might very well have answered that the case, having been tried on one theory, ought not to be sent to the jury on another. We have had occasion to say something to that effect as conducive to a fair and just trial, and a bar to mistake and surprise, although in a case where the new theory first made its appearance on appeal. (*Salisbury v. Howe*, 87 N. Y. 128.) The trial judge, however, determined to hear and decide "the whole question," and, after argument, granted a nonsuit as to the mayor and common council, but held that the action was against the defendants individually, and the question of negligence as to the defendant Whitney must go to the jury. What has been said as to the proper construction of the complaint sufficiently indicates the ground of our concurrence with the conclusion of the trial court in that respect. The case, therefore, became one of negligence by an officer in the performance of official duty. (*Robinson v. Chamberlain*, 34 N. Y. 389.) It was not a case of non-feasance, or omission to act at all, where in some cases as to the repair of highways, it may be necessary to show adequate means in the hands of the officer; but a case of misfeasance, where the officer had acted, but conducted himself negligently to the special injury of an individual. Where that negligence is willful or intentional, the city charter makes it a misdemeanor, and "in addition thereto" declares the liability for damages to the party injured; but we do not understand this provision as taking away, or in any manner destroying the right of the party injured, to sue for simple negligence, where an official act or omission of duty has resulted in his injury. We agree with the General Term that the provision referred to did not repeal the common-law

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rule applicable to a case not named or made the subject of legislation by the charter itself, and was not intended to affect the rule of liability declared in the cases to which reference has been made.

An examination of other exceptions taken in the progress of the trial has disclosed no error affecting its result.

The judgment and order should be affirmed, with costs. All concur.

Judgment and order affirmed.

HORACE S. WHITING, Appellant, v. JOHN EDMUNDS et al.,
Respondents.

94	309
110	543
94	309
112	287

A tenant cannot by a disclaimer, or by mere words denying his landlord's title and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. The possession of the tenant and of his grantees and assigns is that of the landlord, and not hostile or adverse, and this is so as to a grantee who has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation.

The possession of the tenant, thus in subordination to the title of the landlord, continues, not only during the term, but is presumed to remain unchanged until twenty years after the termination thereof and notwithstanding any claim of the tenant or his successors to a hostile title. (Code of Civil Procedure, § 373.)

To rebut this presumption and initiate an adverse holding, the tenant must do something equivalent to a surrender of possession to the landlord, and bring home to him knowledge of the adverse claim.

In an action of ejectment, it appeared that the premises in question were, in 1824, in the possession of a tenant who held under a lease from W., dated in 1823, and running for twenty years. In order to get possession, R. T., who had or claimed a title under a deed from B., employed I. to purchase the lease, which he did with the money of R. T., taking an assignment, however, in his own name. By collusion with I., and without the knowledge of the landlord, R. T. entered into possession, asserting title under the deed from B. The lease, however, was found in his possession, and he made several efforts to buy the W. title. Plaintiff claimed under deeds from the heirs of W. to C., executed in 1858 and 1859. The premises were then in the possession of grantees of G. F. T., who entered under a deed in 1846. It was admitted by defendants that R. T. "and the grantees under him have been in possession

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* * * and that defendant is now in possession under that (R. T.'s) claim of title." The trial court refused to submit to the jury the question as to the character of R. T.'s entry into possession, and non-suited plaintiff. *Held* error; that if R. T., when he entered in 1824, became the tenant of W., his possession and that of his grantees remained the possession of his landlord not only until the end of the term, but presumably for twenty years thereafter, *i. e.*, until 1863, and so there was no adverse possession at the time of the conveyance to C. making his deed void for champerty; and that, therefore, the question as to the character of R. T.'s possession should have been submitted to the jury. C. deeded to G. F. T. in 1869, the latter executing a mortgage back. At that time the title under the deed of 1846 to G. F. T. was in his wife. The mortgage was assigned to plaintiff, who foreclosed the same in 1870, making the wife a party; he became the purchaser and received a referee's deed in 1874. It was claimed by defendants that the deed from C. was void for champerty. *Held*, the surrounding facts left it possible that G. F. T. was in actual possession when C.'s deed to him was given, and that he took the deed and gave back the mortgage with the knowledge and assent of his wife; and so, it could not be said, as matter of law, that said deed was void.

As to whether, conceding the deed to have been void, C.'s title did not pass to the plaintiff by estoppel, *quære*.

Where, upon the trial of a cause, it was stipulated that either party might read from the printed case in another action, "whatever was relevant to this action," and there appeared in said case a stipulation admitting certain facts, which was read without objection, *held*, that the facts must be taken as so admitted; and that the stipulation could not be rejected or disregarded on appeal.

As to what might have been the effect of a proper objection interposed in time, *quære*.

(Argued November 26, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made October 28, 1881, which denied a motion for a new trial, and directed judgment in favor of defendants upon an order nonsuiting plaintiff on trial.

The nature of the action and the material facts are stated in the opinion.

H. V. Howland for appellant. Royal Torrey is estopped from setting his own title up as a defense against the title under which he entered; and whatever estops him estops his

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grantees. (*Burham v. Van Zandt*, 7 Barb. 91; *Phelan v. Kelly*, 25 Wend. 389; *Jackson v. Walker*, 7 Cow. 637; 3 Ad. & Ell. 188; 2 id. 17; *Failing v. Schenck*, 3 Hill, 344; *De-Lancy v. Ganong*, 5 Seld. 9.) The doctrine of forfeitures of leases by disclaimer only applies to tenancies at will or sufferance. (*De Lancy v. Ganong*, 5 Seld. 9.) The presumption is, that at the time the deed to Chamberlain was executed, the land was occupied under the lease and so it was not void for champerty. (*Smith v. Burtis*, 9 Johns. 180; *Chamberlain v. Edmunds*, Monroe Gen. Term, 1866; 3 R. S. [6th ed.] 476, § 86; *Crary v. Goodman*, 22 N. Y. 176; *Fish v. Fish*, 39 Barb. 513.) A fraudulent deed, or invalid deed, will not serve as a foundation of an adverse possession. (*Jackson v. Andrews*, 7 Wend. 152; *Jackson v. Hill*, 5 id. 532; *Livingston v. Iron Co.*, 9 id. 511; *Howard v. Howard*, 17 Barb. 663, 668.)

W. F. Cogswell for respondents. The deed from the heirs of Jacob Winchell to Chamberlain, plaintiff's grantor, was champertous and void, and obtaining the same was a misdemeanor. (2 R. S. 691, § 6; *Jackson v. Ketchum*, 8 Johns. 479; *Pepper v. Haight*, 20 Barb. 429; Tyler on Ejectment, 935.) Plaintiff was not aided by the Recording Act, his mortgage not having been recorded prior to his deed, but at the same day and hour. (1 R. S. 756, § 1.) The admissions made on the trial in which Chamberlain was plaintiff and Edmunds defendant were not admissible in this case. (*Cook v. Barr*, 44 N. Y. 156.)

FINCH, J. This was an action of ejectment. The plaintiff made title by showing a deed from Williams and wife to George F. Torrey, given and recorded in 1846; a mortgage by George F. Torrey to W. S. Chamberlain in 1869; an assignment of that mortgage to plaintiff in 1870; and a foreclosure of the same and referee's deed to plaintiff in 1874. He further proved a deed from Chamberlain to George F. Torrey in 1869, and rested. The plaintiff thus asserted title and possession in Williams in 1846, and at the same date in George F. Torrey as

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the grantee of Williams, and also title and possession in Chamberlain as the grantor of Torrey in 1869, but proved no title or possession in either. The omission, however, was cured by the evidence of the defendants, who also asserted or conceded title and ownership in George F. Torrey as the grantee of Williams, by making his title, thus derived, the source and foundation of their own. Beginning with his conveyance from Williams, they proved a quit-claim deed from George F. Torrey to Charles H. Torrey, dated in 1847, but acknowledged and recorded in 1864; a power of attorney from Charles H. to George F., dated and acknowledged in 1849, and recorded in 1854; a deed by Charles H. through his attorney to the defendant, Betsey Torrey, dated and acknowledged in 1855, and recorded in 1869; and a lease from the defendant Betsey, to the defendant Edmunds, in 1874. The defendants then rested.

At this point of the case the title was in them. Both parties agreed upon George F. Torrey as the common source of title, and so necessarily conceded his ownership and possession. (*McBurney v. Cudler*, 18 Barb. 207.) But the plaintiff by his proof asserted two independent titles in George F. Torrey, the one derived from Williams in 1846, and that from Chamberlain in 1869. The first having failed him, the plaintiff entered upon a new line of proof designed to establish the Torrey title of 1869, and make it paramount to the Torrey title of 1846, under which the defendants claimed. He traced Chamberlain's title to deeds from the Winchell heirs in 1858 and 1859, and gave evidence of title and possession under it earlier than 1846, in their ancestor and his grantors. It appeared, however, from the admissions of plaintiff's own witnesses, that when the Winchell heirs conveyed to Chamberlain, they were out of actual possession, as was Chamberlain himself; that the purpose was to enable Chamberlain to commence a lawsuit, and he was to pay the consideration for his deed only in case he succeeded in getting "a set of vagabonds off that was on the land." Since it stands admitted in the case that "George F. Torrey, or his grantees holding under him, have been in the possession of the premises described in the complaint from the time he received

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his title under the Williams deed in 1846, to the present time," it follows that the "vagabonds" referred to were the grantees of George F. Torrey under the Williams title, the validity of which had been once asserted by the plaintiff and conceded by the defendants. The deeds from the Winchell heirs to Chamberlain, and from the latter to George F. Torrey, were therefore claimed to have been void for champerty, and the General Term so held. There would be no doubt about it, but for still another element in the evidence, and another admission, which form the final reliance of the plaintiff, and bring to the surface the exact question to be decided.

His efforts were directed to a removal of the vice of champerty from the conveyance by the Winchell heirs, and he sought to accomplish the result by connecting the George F. Torrey title, of 1846 and the possession under it with the title and possession of one Royal Torrey in 1824. On this subject the plaintiff's evidence tended to establish that Royal Torrey had a title, real or pretended, adverse to Winchell, and derived from one Bogardus, but was out of possession and could not obtain it except by some device or artifice; that at this time, in 1824, the premises were in the possession of one Orin Wellman as tenant of Winchell, under a lease dated in 1823, and running for twenty years; that Royal Torrey planned to get possession through the agency of this lease, and for that purpose employed one Ives to buy it of Wellman, which Ives did, taking the assignment in his own name, but making the purchase with Torrey's money, at his request and for his benefit; that thereupon he told Ives not to enter under the lease but let him, Torrey, enter under his deed; and accordingly Torrey entered, asserting his title under the Bogardus deed, but by collusion with Ives, who held the lease for him, and without the knowledge of the landlord; that the lease was afterward found in the possession of Torrey, who on several occasions sought to buy in the Winchell title. Upon this state of facts the plaintiff insisted that Royal Torrey's possession, and that of his grantees who succeeded him was the possession of the

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landlord, and under and not adverse to the Winchell title. The general rule which forbids the tenant to dispute his landlord's title has led to some other propositions material to our inquiry which seem to have been settled. The tenant cannot by a disclaimer, or by mere words denying the landlord's title and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. (*De Lancey v. Ganong*, 9 N. Y. 1.) Where the relation of landlord and tenant has been once established, the possession of the latter and that of his grantees and assignees, is the possession of the landlord, and not hostile or adverse (*Jackson v. Davis*, 5 Cow. 129; *Sands v. Hughes*, 53 N. Y. 293); and this is true even where the grantee has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of a tenant, the latter denying any such relation. (*Jackson v. Scissam*, 3 Johns. 499.) The possession of the tenant in subordination to the title of the landlord continues not only during the running of the term, but is presumed to be such and to remain unchanged until twenty years after the end of the term, and notwithstanding any claim by the tenant or his successors of a hostile title. (Code, § 86; Code of Civ. Pro., § 373.) This presumption may be rebutted, but, to do so effectively and initiate an adverse holding, the tenant must surrender the possession to the landlord, or do something equivalent to that, and bring home to him knowledge of the adverse claim. (1 Washb. on Real Prop. [3d ed.] 492; *Jackson v. Stiles*, 1 Cow. 575; *Thayer v. Society of United Brethren*, 20 Penn. St. 62; *Towne v. Butterfield*, 97 Mass. 105.) It follows, therefore, that if Royal Torrey became the tenant of Winchell, his possession remained the possession of his landlord, not only to the end of the term in 1843, but presumably for twenty years thereafter, or until 1863, and the possession of his grantees or assignees bore the same character for the same period, in the absence of evidence sufficient to rebut the statutory presumption. If then Williams and George F. Torrey in 1846, and their grantees down to 1858 and 1859, were also the grantees of Royal Torrey and successors to his possession, they stood presumably as tenants

of the Winchell title when Chamberlain took his deed, and so that conveyance was good and not void for champerty.

But were Williams and his successors along the line of defendants' title grantees of Royal Torrey? No conveyance from the latter is shown. Between him and Williams no links of successive deeds and transferred possession are established. The difficulty would be fatal to plaintiff's theory but for an admission which appears in the printed case, and which reads, "it was here admitted by defendant's counsel that since 1824 Royal Torrey and the grantees under him have been in possession of these premises, and that defendant is now in possession under that claim of title." Since it was also admitted that from the time of the Williams deed his grantees had been in possession, it fairly follows that they were also grantees of Royal Torrey. We cannot suppose them to be other or different without making the admissions contradictory, and involving at the same time and in the same premises the co-existence of two hostile and inconsistent possessions.

But the respondent asserts that there was no such admission on the present trial; that it was made on one between Chamberlain and Edmunds tried in 1864; and got into the case through a stipulation permitting either party to read from the printed case in that action "whatever was relevant to this action." That the stipulation had this origin the appellant's counsel admits in his brief. But it was read without objection. It came into the case without any challenge of its admissibility, or its competency as proof of the fact asserted. We find it there, and so received, and have no right to reject and disregard it. (*Cook v. Barr*, 44 N. Y. 158.) Upon this ground in part was rested the decision in *Owen v. Cawley* (36 N. Y. 605-606). Evidence given on a former hearing was read on the trial. No objection was taken to its admissibility, and for that reason the court said the question could not be raised on appeal. We must, therefore, give effect to the stipulation, although not deciding what might have been the result of a proper objection interposed in time.

The consequence follows that the nonsuit granted in this

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case was wrong, and the refusal to submit to the jury the question of fact as to the character of Royal Torrey's entry into possession was error, unless the decision can be sustained upon the ground that Chamberlain's deed to George F. Torrey in 1869, and after the presumption of tenancy was lost by lapse of time, was void as champertous and so the mortgage and title founded on it failed. It may be that, after 1863 when the statutory presumption no longer operated, the possession of the premises under deeds of the fee and color of title by the grantees of George F. Torrey in the year 1869 should be deemed adverse to the Winchell title, and so Chamberlain's deed to George F. Torrey in that year would prove to be void. But there is no sufficient evidence before us to raise that question. No proof shows to us who was in actual possession in 1869, except the inference from the admission that it must have been George F. Torrey or his grantees, but which we are not specifically informed. At that date the legal title was apparently in Betsey Torrey, who was the wife of George F. On the foreclosure of her husband's mortgage to Chamberlain she was made a party defendant. The judgment-roll put in evidence is not printed in the case. We only know that as against Betsey Torrey the mortgage to Chamberlain was adjudged good to the extent of her right of dower. While we must assume that the judgment did not affect her title as owner, the surrounding facts leave it possible that George F. Torrey was in actual possession when Chamberlain's deed to him was given, and that he took the deed and gave back the mortgage with the knowledge and assent of his wife. However this may be, it is quite certain that under the peculiar state of facts existing, and the inferences capable of being drawn from them, it could not be said as matter of law that the deed of 1869 to Torrey was void. And if it was, a question might yet remain, which we need not now consider, whether Chamberlain's title did not pass to the plaintiff by estoppel.

These views of the case show that the vital question in it was the character and intent of Royal Torrey's entry and possession. That was a question of fact. (*Jackson v. Dobbin*, 3

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Johns. 224; *Smith v. Burtis*, 9 id. 174.) Very much of the evidence bore upon it. It was possible for a jury to say that he obtained possession solely as tenant of Winchell and under the purchased lease. We give no opinion upon the subject, but the question should have gone to the jury, and plaintiff's request to go to the jury upon all the facts of the case was erroneously refused and the nonsuit improperly granted.

The judgment should be reversed and a new trial granted. costs to abide the event.

All concur, except MILLER, J., taking no part.

Judgment reversed.

ELEANOR B. KING, Respondent, v. WILLIAM MACKELLAR,
Appellant.

Where a complaint alleged that plaintiff intrusted to defendant a sum of money upon his promising to invest the same for the former, but that he converted it to his use and refused to pay the same, *held*, that plaintiff, in the absence of any amendment of the complaint, was not entitled to recover upon proof that defendant did in good faith invest the money, but negligently took insufficient security; that it was necessary to show either that defendant made no investment, or if he did in form, that it was not *bona fide*.

In such an action evidence was given to the effect that plaintiff authorized the investment of the money in a second mortgage to be taken by defendant's wife on a conveyance by her of the mortgaged premises, that the premises were conveyed, the mortgage taken and assigned by the wife to plaintiff. The premises were sold on foreclosure of the first mortgage. The case was submitted to the jury solely on the question as to whether such assignment was a *bona fide* investment of plaintiff's money. It appeared that interest was regularly paid by the mortgagor from 1871, when the mortgage was given, until 1877. Defendant then offered evidence of the value of the property when the mortgage was given, which was objected to and excluded. *Held* error; that if in fact the mortgage was a substantial and good security when taken and assigned, this was material and proper upon the question of good faith. Defendant's counsel sought to sustain the ruling on the ground that although the mortgage was taken and assigned by defendant's wife, yet that he was the real party, and the investment was a dealing by him as

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plaintiff's agent with himself and so invalid. *Held* untenable; as the case was not submitted to the jury on that question.

(Submitted November 26, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 17, 1881, which affirmed a judgment in favor of plaintiff entered on a verdict.

The nature of the action and the material facts are stated in the opinion.

Herbert T. Ketcham for appellant. Conversion is a hostile interference with the owner's control. (*McMorris v. Simpson*, 21 Wend. 610; 2 Greenl. Ev., § 642; *Salt Spring Bank v. Wheeler*, 48 N. Y. 492; *Laverty v. Snethen*, 68 id. 522; *Freeman v. Venner*, 120 Mass. 424.) Negligent performance of duty is not conversion, and can only be redressed in an action on the case. (*Dickinson v. Dudley*, 17 Hun, 569; *Sergeant v. Blunt*, 16 Johns. 74; *Laverty v. Snethen*, 68 N. Y. 522.) The court erred in refusing to charge defendant's request, that though the jury find that the defendant was, at one time, requested by the plaintiff to make an investment of \$2,100 for her, yet all agency, duty and responsibility which thereby rested on the defendant were revoked and ended if the plaintiff afterward instructed Thomas MacKellar to do the same thing, or that which included the same thing. (Story on Agency, § 474.) Plaintiff, having failed to cause a release or reconveyance to be made, or to have the record canceled, has, therefore, made no rescission. (*Moyer v. Shoemaker*, 5 Barb. 319; *Wheaton v. Baker*, 14 id. 594; *White v. Seaver*, 25 id. 235.) Proof of plaintiff's ignorance of the effect of her acts, and of the facts before her, was erroneously admitted. (Broom's Legal Maxims, 253; 1 Wait's Actions and Defenses, 219, 220, 232, 233, 256.) The court, although it committed the facts to the jury "on the evidence," erred, because it assumed to tell the jury what that evidence was, and constrained them to regard

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that evidence as all hostile to the defendant. (*Vedder v. Fellows*, 20 N. Y. 126, 130.)

F. R. Coudert & Paul Fuller for respondent. Facts as found by a primary tribunal, and affirmed by the General Term, are conclusive upon this court. (Code of Civil Procedure, §§ 1337, 1338; *Loeschick v. Baldwin*, 38 N. Y. 326; *Barker v. White*, 3 Keyes, 495; *In re Ross*, 87 N. Y. 514; *Williams v. Western U. T. Co.*, MSS., October 3, 1883; *Phelps v. MacDonald*, 26 N. Y. 82; *Marvin v. Univers. L. Ins. Co.*, 85 id. 282.) There was ample evidence of a state of facts upon which the law would justify the judgment appealed from (*Fulton v. Whitney*, 66 N. Y. 555; *Davous v. Fanning*, 2 Johns. Ch. 252; *Gardiner v. Ogden*, 22 N. Y. 327; *Graves v. Waterman*, 4 Hun, 689; 63 N. Y. 657; *Conkey v. Bond*, 36 id. 429; *Duncombe v. N. Y., etc., R. R. Co.*, 84 id. 198.) The exceptions to the admission of evidence over defendant's objection were not available, no grounds of objection having been stated. (*Requa v. Holmes*, 16 N. Y. 193; *Valton v. Nat. Fund Life Ins. Co.*, 20 id. 32; *Newell v. Doty*, 33 id. 83; *Levin v. Russell*, 42 id. 251; *Chester v. Dickerson*, 54 id. 13.) Though a defendant moves for a nonsuit, and is entitled thereto, yet, if his motion being denied, he puts in evidence, and subsequently plaintiff's case is established, defendant's exception to the refusal to nonsuit is waived (*Colegrove v. Harlem, etc., R. R. Co.*, 6 Duer, 382; affirmed, 20 N. Y. 492; *Gardiner v. Ogden*, 22 id. 327.) A request is bad which requires a judge to assume in his charge matter of fact upon which the jury are to pass. (*Deems v. Crook*, 1 Edw. 95.)

RAPALLO, J. The cause of action set forth in the complaint is, that the plaintiff intrusted to the defendant, at his request, the sum of \$3,000, upon his promise duly to invest the same for the plaintiff on bond and mortgage upon real estate in the city of New York, but that the defendant converted the money to his own use, and refused to repay the same to the

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plaintiff on demand made by her. This is the only cause of action alleged.

If the defendant did actually and in good faith invest the money in the manner promised, proof that he took an insufficient security, or even that he was negligent in his selection of the security, would not be sufficient to sustain the action in the form in which it is brought. It was necessary to show that the defendant made no such investment as that authorized, but appropriated the money to his own use, or if he did in form make an investment of it, that it was not a *bona fide* investment, but a mere sham. Such a misappropriation of the money intrusted to him by the plaintiff for investment would subject the defendant to a much more onerous liability than mere want of care in performing his undertaking to invest it.

These points were fully raised in the course of the trial, and no attempt was made to amend the complaint.

There was evidence in the case to the effect that the plaintiff authorized the investment of her money in a certain mortgage for \$3,000, on a house and lot on Second avenue, in the city of New York, known as the Sampson mortgage, which was to be taken by the defendant's wife on a conveyance of the property by her to one Sampson. An assignment of this mortgage was made by defendant's wife to the plaintiff in the year 1871, on the same day that the property was conveyed and the mortgage given. The execution of the assignment at that time was admitted on the trial. The mortgaged premises were subject to a prior mortgage of \$6,000, covering the principal part of the premises, and subsequently in 1877, this prior mortgage was foreclosed and the premises covered thereby sold for \$7,000. There was evidence tending to show that the plaintiff knew that the mortgage in which her money was to be invested was a second mortgage, and the court charged the jury that if she did know this fact, she could not recover. The case was submitted to the jury on the question whether the assignment of the Sampson mortgage was a *bona fide* investment of the plaintiff's money. It appeared that the mortgage was taken on a trade of properties between the defend-

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ant and Sampson, in which trade the mortgaged premises, which stood in the name of the defendant's wife, were put in at a valuation of about \$18,000, but the plaintiff contended on the trial that the transaction was not a *bona fide* investment of the plaintiff's money. This was the issue upon which the case went to the jury. It appeared in evidence that the interest on this Sampson mortgage was regularly paid to the plaintiff from 1871 to 1877, and that Sampson, the mortgagor and owner of the mortgaged premises, held them until that time and recognized his indebtedness upon the mortgage. The defendant then offered evidence of the value of the mortgaged premises in 1871, when the mortgage was given, and this evidence, being objected to, was excluded by the court and an exception taken.

This we think was error. The issue upon which the case was tried and submitted to the jury was whether the plaintiff's money was in good faith invested in the Sampson mortgage. If it was in fact a substantial and good security at the time, that fact would go far in sustaining the *bona fides* of the defendant in making the transaction. The plaintiff's counsel now seeks to sustain the ruling on the ground that though the Sampson mortgage was made to defendant's wife, and assigned by her, yet the defendant was himself the real party, and that when acting as plaintiff's agent to invest her money, he could not deal with himself, by investing it in a mortgage belonging to himself. There are several answers to this proposition. There was evidence showing that the proposition to plaintiff to invest her money in the Sampson mortgage was made by a son of the defendant and that the defendant had no communication with the plaintiff on the subject, but that she authorized the son to procure the investment in that mortgage, and furnished him with part of the money for that purpose, the other part being already in the hands of the defendant, that the defendant objected to the assignment of that mortgage to the plaintiff, but finally consented at the solicitation of the son. The plaintiff supposed that the father and son were connected in business, but this was denied. There is also evidence that the plaintiff,

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with knowledge that the mortgage was assigned by defendant's wife, ratified the transaction. All these matters presented questions of fact for the jury. But a decisive answer is, that the case was not submitted to the jury on the question whether this investment was a dealing by the defendant as plaintiff's agent, with himself, and invalid for that reason. On the contrary the court expressly charged that if the jury found that the defendant in good faith, and fairly, took the Sampson mortgage, no matter whether it was his wife's mortgage, or his own, he was not responsible if he did his best and acted fairly in investing the money; but that on the other hand if they found that he took the plaintiff's money and used it without carrying out the agreement he made, the plaintiff was entitled to have the money restored to her. The case was thus squarely submitted to the jury on the single question of the honesty and good faith of the defendant in the transaction, and on this issue we think that if he could have proved that the value of the mortgaged premises was at the time so great that they afforded ample security for all the mortgages upon them, he was entitled to the benefit of that fact.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

JAMES H. CRONKHITE, Respondent, v. JONAS CRONKHITE, Appellant.

In 1832, J. & H., who owned adjoining farms, agreed orally to lay down logs or pipes upon the lands of J. to carry water from a spring thereon to his buildings, for his use, and from thence to the buildings of H., for his use, each to bear one-half of the expense and perform half of the labor, and in consideration of such expenditure J. agreed that H. should have the right to take the surplus water from the spring through the pipes. There was no specific agreement, however, as to the size of the pipes, how long they were to be continued, who should direct or control them, or the amount of water to be taken, nor was there any arrangement authorizing H. to enter upon the lands of J. for the purpose of repairing, etc. The agreement was carried out, and H. and his successor in title enjoyed the use of the water for over forty years. In an action to restrain defendant, who succeeded to the title of J., from obstructing such use of the water, *held*, that these facts failed to establish a valid agreement in perpetuity; that at most the agreement was a mere license, which, although a consideration was paid, was revocable at the pleasure of the licensor or his successors in interest; that plaintiff could not claim by adverse possession, as the use was by consent, and not adverse.

An oral contract, which equity will regard as equivalent to the grant required at common law to create an easement, must be clear and specific so that it may be carried out and enforced, and it must be accompanied by acts of part performance, unequivocally referable to the agreement.

(Argued November 27, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made December 30, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to restrain defendant from obstructing or interfering with certain pipes by which water from a spring upon defendant's lands was conveyed to the buildings upon the lands of plaintiff.

The facts, so far as material, are stated in the opinion.

J. B. Rafter for appellant. The old maxim, *secundum allegata et probata*, has never been so far departed from as to allow a party to recover upon a cause of action not alleged.

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108	459
110	592
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118	251
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(*Neudecker v. Kohlberg*, 81 N. Y. 301; *Wright v. Delafield*, 25 id. 266-268; 84 id. 38, 43; 18 Hun, 485; *Wright v. Weeks*, 25 N. Y. 153-157.) The use having been begun under an oral license was revocable, and the fact that a consideration was paid for the permission does not make it irrevocable; and the defendant will not be prevented from asserting his rights by equitable estoppel, where he has been guilty of no fraud, and has not induced or encouraged the other party to act, so that it would be a fraud on his part to revoke his license. (49 N. Y. 589; *Luce v. Carley*, 24 Wend. 451; *Houghtaling v. Houghtaling*, 5 Barb. 384; *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 20 Hun, 216; *Murdock v. P. P. & C. I. R. R. Co.*, 73 N. Y. 584; *Mumford v. Whiting*, 15 Wend. 381; *Miller v. A. & S. R. R. Co.*, 6 Hill, 61; *Selden v. D. & H. C. Co.*, 29 N. Y. 639; *Babcock v. Utter*, 1 Keyes, 397; *Wolf v. Frost*, 4 Sandf. Ch. 77; Washburn on Real Property, 542; *Davis v. Townsend*, 10 Barb. 343; *Phillips v. Nowlan*, 6 N. Y. Weekly Dig. 132; *Eggleston v. N. Y. & H. R. R. Co.*, 35 Barb. 162; *Pattin v. L. I. R. R. Co.*, 2 Barb. Ch. 231; *Wood v. Leadbitter*, 13 M. & W. 383; *Bryan v. Whistler*, 8 B. & C. 288; 42 Barb. 325; *Wolf v. Frost*, 4 Sandf. Ch. 72; *Wheeler v. Reynolds*, 66 N. Y. 227-231; *Perripont v. Barnard*, 6 id. 299; Brown on the Statute of Frauds, §§ 27, 28; *Babcock v. Utter*, 1 Abb. Ct. App. Dec. 27-62; *Bryan v. Wheeler*, 8 B. & C. 288; *Wiseman v. Luoksinger*, 84 N. Y. 31.) To acquire rights to real estate by prescription, the use for twenty years must be exclusive, open and notorious, under a claim of right, hostile in its inception and with the knowledge of the owner, and it must appear affirmatively that the claim was hostile. (*Miller v. Garlock*, 8 Barb. 153; *Parker v. Fort*, 29 Wend. 313; *Jackson v. Halstead*, 5 Cow. 216; *White v. Spencer*, 14 N. Y. 252; *Colvin v. Burnett*, 17 Wend. 564; *Burbank v. Fay*, 65 N. Y. 65; *Flora v. Carbean*, 38 id. 111; *Colvin v. Burnett*, 17 Wend. 567.) The use of an easement or the enjoyment of a license cannot be enlarged. (*Markham v. Stowe*, 66 N. Y. 574; *Stiles v. Hooker*, 7 Cow. 266; *Ev. L. St. J. O. H. v. B. H. Ass'n*, 64 N. Y. 561; *Onthank v. M.*

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S. R. R. Co., 71 id. 194.) As to what is a personal transaction or communication the same rule applies as was applied to section 399 of the Code of Procedure. (*Holcomb v. Holcomb*, 20 Hun, 158; 69 N. Y. 260; *Sconmaker v. Wolford*, 20 Hun, 169; *Bargue v. Lord*, 67 N. Y. 495; *Hobart v. Hobart*, 62 id. 84.) The defendant had a right to dig the well for any purpose he chose. (*Trustees, etc., of Delhi v. Yomans*, 50 Barb. 316; affirmed, 45 N. Y. 362; *Johnstown Manuf. Co. v. Veghte*, 69 id. 16; *Phillips v. Nowlan*, 72 id. 39; *Bliss v. Greeley*, 45 id. 671; *Panton v. Holland*, 17 Johns. 92; *Kerrains v. People*, 60 N. Y. 221.)

Amos H. Prescott for respondent. The defendant is estopped from asserting that the parol agreement proved was void under the statute of frauds, it having been fully executed, the possession having been taken under it by the plaintiff and his predecessor in the title, and it having been continuous since 1832. (*Ward v. Warren*, 82 N. Y. 265; *Beardsley v. Duntley*, 69 id. 577; *Wheeler v. Reynolds*, 66 id. 227; *Miller v. Ball*, 64 id. 286; *Freeman v. Freeman*, 43 id. 34; *Lobdell v. Lobdell*, 36 id. 327; *Wood v. Fleet*, id. 499; *Ryan v. Dox*, 34 id. 307; *Malins v. Brown*, 4 id. 403; *Lowry v. Lew*, 3 Barb. Ch. 407; *Parkhurst v. Parkhurst*, 14 Johns. 15; *Corkhill v. Landers*, 44 Barb. 219; *Bennett v. Abrams*, 41 id. 619; *Wetmore v. White*, 2 Caine's Cas. in Eq. 109; *Hobbs v. Wetherwax*, 38 How. 385; *Church v. Kidd*, 3 Hun, 254; Angell on Water-Courses, 318-330; 2 Story's Eq. Jur., § 759; *Briggs v. Proper*, 14 Wend. 227.) Upon the facts proved no error was committed by the referee in assessing the damages. (*Johnstown v. Veghte*, 69 N. Y. 16; *Onthank v. L. S. R. R. Co.*, 71 id. 194; *McMillan v. Cronin*, 75 id. 474; *Beals v. Stewart*, 6 Lans. 408; *Roberts v. Roberts*, 7 id. 551.) Plaintiff's testimony as to the declaration of his predecessor in title, in a conversation with plaintiff's father on the morning after he had made his will and just before his death, in regard to the spring, was competent, plaintiff not being at that time interested in the transaction, and having taken

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no part in the conversation. (*Cary v. White*, 59 N. Y. 336; *Hildebrant v. Crawford*, 65 id. 107; *Ward v. Warren*, 82 id. 265.) The defendant's intentions in digging the well near the spring were wholly immaterial; he was responsible for his acts. (*Phelps v. Nowlan*, 72 N. Y. 39.) In equity actions the court will always look at the entire case and see whether substantial justice has been done, and where that appears it will affirm the judgment, notwithstanding the admission of testimony which in ordinary actions at law might have necessitated a new trial. (Code of Civil Pro., § 1003; *Church v. Kidd*, 2 Hun, 267; *Platt v. Platt*, 2 N. S. C. R. 52.)

MILLER, J. The referee, before whom this action was tried, found that, in or about 1832, Henry C. Cronkhite (plaintiff's father) and John C. Cronkhite (defendant's father), who owned adjoining farms, entered into a contract or agreement whereby they agreed to lay down logs or pipes upon the lands of John C. Cronkhite to carry water from a spring upon his farm to his buildings for his use, and from thence to the buildings of Henry C. Cronkhite for his use; and that it was agreed that Henry C. Cronkhite should bear one-half the expense, and perform half the labor of procuring and laying down the logs and pipe, etc.; and that, in consideration of such expenditure and labor, he should have a right to take water from said spring through logs and pipes in perpetuity, etc. The complaint alleges an agreement in writing upon which the plaintiff's right to maintain this action is founded. At the trial no written agreement was proved, and the plaintiff relied upon parol proof of the declarations and acts of the parties which, as he claimed, established the right to use the water in the spring by adverse possession for a period of forty years or over. The agreement found by the referee rests upon the oral declarations of John C. Cronkhite in allowing his brother, Henry C. Cronkhite, the right to take and use the surplus water of the spring, which was upon the land of the former, and which he used for his own benefit. The testimony upon the trial established a parol contract between John C. Cronkhite and Henry C. Cronkhite,

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whereby Henry C. was to take and use the water, and there was proof showing that both parties acted in accordance with that agreement. Money was expended by Henry C., pipes were laid down and improvements made in connection with the use of the water, but there was no specific agreement as to the size of the pipes, the amount of water to be carried through them, how far below the surface they were to be laid, how long they were to be continued, or who was authorized to direct and control them and decide as to their character. Nor was there any arrangement which authorized Henry C. Cronkhite to enter upon the land of his brother for the purpose of repairing, laying down, or improving the pipes, nor was the quantity of water to be used by either party fixed, except by the gauging at the spring, when a new line of pipes was laid. The arrangement made had reference to the surplus water belonging to John C., and it was evidently intended that Henry should only have the use of that. In case of a deficiency of water, by reason of the spring giving out, or in consequence of an increase in its use by John C. for his own purposes, the agreement might be ended. Disagreements might also arise as to how, and when, and where the pipes should be laid and repaired, and as to the manner in which the spring should be protected, and thus it would be difficult for a court of equity to determine the precise character of the agreement. The evidence given upon the trial was too vague and uncertain to establish a valid agreement in perpetuity such as the law recognizes. The statute requires an agreement of this character to be in writing, expressing a consideration, and to establish it otherwise, by adverse possession, the proof should be entirely clear as to the nature and specific character of the agreement so that it can be eventually carried out and enforced.

To enforce an agreement relating to real estate, in a court of equity, it must be a complete and sufficient contract founded not only on a valuable consideration, but its terms defined by satisfactory proof accompanied by acts of part performance unequivocally referable to the supposed agreement. (*Wiseman v. Lucksinger*, 84 N. Y. 31; 38 Am. Rep. 479.) No such

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agreement was established on the trial, and we think that the finding of the referee was without sufficient evidence to support it. The most that can be claimed as to the agreement proved is that it was a license which was revocable at the pleasure of the person granting the same, or his heirs or representatives. The right to revoke a license, which does not partake of the character of a grant, and where the rights are not affirmatively and definitely fixed and settled, is fully established by the authorities. Even when a consideration is paid the right of revocation exists where the terms of the agreement are not of such a nature as to make out a valid agreement which could be enforced in equity. Nor does the fact of the performance of the agreement render it effectual and valid unless the acts of performance are so clear, definite and certain in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution. (*Wheeler v. Reynolds*, 66 N. Y. 227.)

The question under discussion in this case has been the subject of consideration recently in this court. In the case of *Wiseman v. Lucksinger* (84 N. Y. 31; 38 Am. Rep. 479), the plaintiff had paid a sum of money for permission to drain his lot upon the land of the defendant, and took a receipt for the same, and he used and enjoyed the privilege for twenty-five years, when the defendant revoked the permission. In an action to enforce the right of the plaintiff, it was held that such user did not give the plaintiff a prescriptive right to the easement, as the possession was by consent of defendant and there could be no adverse possession until defendant cut off plaintiff's drain. It was also held that the right to drain was an easement which could not be conferred by parol license, but could be granted only by deed or conveyance in writing, and that an oral contract, which equity will regard as equivalent to the grant required at common law or by statute, must as already stated be a complete and sufficient contract in all its parts.

The authorities are fully discussed in the opinion in the case cited, and, within the law as there laid down, that case is de-

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cisive of the question now presented. Following that decision it is manifest that the referee erred in his finding.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

SHEPHERD F. KNAPP, as Receiver, etc., Respondent, v. WALTER ROCHE, Appellant.

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Where a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer.

Satisfaction by one joint tortfeasor is a bar to an action against another: so a partial satisfaction by one is proper to be shown by another in mitigation of damages.

In an action brought by a receiver of an insolvent savings bank against an officer thereof to recover damages for losses alleged to have been occasioned by illegal loans made by him, it appeared that two other officers co-operated in making the loans; the complaint averred and it also appeared by plaintiff's evidence that portions of such loans remained unpaid. Defendant then offered to prove payment by one of the other officers of a specified sum on account of such claim; this was objected to and excluded. *Held* error; that to maintain the action it was not sufficient to allege and show illegal loans merely, but also damages resulting therefrom, as that the loans had not been paid; and therefore it was competent in reduction of damages to show that a portion of the moneys illegally taken from the bank had been refunded by one jointly liable with defendant therefor; also that the evidence was proper under a general denial in the answer.

(Argued November 27, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 14, 1878, which modified and affirmed as modified a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

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Erastus Cooke for appellant. An action against an officer of a bank, for making loans of its funds in a manner not authorized by law, can only be maintained by strict proof that the corporate funds or property have been lost and wasted, and the corporation has suffered actual loss. (2 Saunders on Pl. and Ev. [5th Am. ed.], part II, p. 1023; Story on Agency, § 236; *Com. Bk. of Albany v. Ten Eyck*, 48 N. Y. 305, 311.) In the case at bar there was no evidence whatever of the taking or loaning of any money, or indeed of any tangible thing, and, therefore, no support for any part of the plaintiff's claim. (*Mott v. U. S. Trust Co.*, 19 Barb. 569; *U. S. Trust Co. v. Brady*, 20 id. 119; *Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, id. 449; *Duncomb v. N. Y., H. & Cent. R. R. Co.*, 84 id. 190.) Until a surrender or restoration to Colburn of the securities which the bank received, the acts of the defendant in hostility to the charter of the bank could not be avoided. (*Duncomb v. N. Y., H. & N. R. R. Co.*, 84 N. Y. 190, 199.) A joint action may be maintained against all the officers who participated in any wrongful act, or any violation of the charter, or a separate action may be brought against each, and a recovery had for the whole amount of the loss caused by the acts of each. There may be but one satisfaction, but there may be several judgments for the wrongful acts of each. (*Livingston v. Bishop*, 1 Johns. 290; *Traders' Ins. Co. v. Roberts*, 9 Wend. 474, 476; *Kasson v. People*, 44 Barb. 347.) The court had undoubted power to amend the defendant's answer on the trial. (Code of Procedure, § 173; *Reeder v. Sayre*, 70 N. Y. 181; *Knapp v. Roche*, 37 N. Y. Sup. Ct. 406; *Chapman v. Dobson*, 78 N. Y. 74; *Smith v. Rathbun*, 75 id. 122, 125; *Parsons v. Sutton*, 66 id. 92, 95; *Poillon v. Volkenning*, 11 Hun, 385; *Crosby v. Watts*, 41 N. Y. Supr. Ct. 208.) A new trial must be ordered when irrelevant evidence has been received under exception, unless the court can see that it would not have affected the verdict. (*Green v. H. R. R. R. Co.*, 32 Barb. 25, 34; *Erben v. Lorillard*, 19 N. Y. 299, 302, 305; *Wright v. Eq. & L. Ass. Co.*, 41 N. Y. Sup. Ct. 1, 16; *Knapp v. Roche*, 62 N. Y. 614.)

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John E. Develin for respondent. The defendant, as an officer of the bank, was its agent, and under the same responsibility to it for any abuse of his powers or violation of his duties as the agent of an individual is to his principal. (*Austin v. Daniels*, 4 Dem. 299.) The defendant was prohibited by the act of incorporation from using its funds in any manner, except to pay its necessary current expenses. (Laws of 1868, chap. 831, § 6.) The jury having thus found upon competent evidence, their verdict conclusively establishes the point that the defendant made these loans. (*Decker v. Myers*, 31 How. Pr. 372; *Mages v. Osborne*, 32 N. Y. 669.) The moneys having been improperly disposed of by the defendant, for any loss occasioned thereby he is liable, and in an action, known under the former practice as an action on the case, a recovery may be had against him. (*Franklin Ins. Co. v. Jenkins*, 3 Wend. 134.) The fact that Smith, the president, co-operated with Roche, the vice-president, in some of these improper investments, or use of the funds of the bank, affords no defense to this action. (*Austin v. Daniels*, 4 Denio, 299.) No business could be legally done by less than five trustees of the bank acting as a board. In this case, the loans having been made by only two, theirs were not a corporate act, but the act of two officers or trustees on their individual responsibility. (*Franklin F. Ins. Co. v. Jenkins*, 3 Wend. 134.) The judge had no power to permit on the trial an amendment to the answer setting up a new defense, viz., payment. (Code, § 723; *Van Syckels v. Perry*, 3 Rob. 621; *Woodruff v. Drekle*, 5 id. 619; *Ford v. Ford*, 53 Barb. 525.)

RUGER, Ch. J. This action is brought by the receiver of an insolvent moneyed corporation against its vice-president to recover damages for losses occasioned by alleged illegal loans made by him of the funds of the corporation.

Such corporation was a savings bank, organized under a special act of the legislature (Chap. 831, Laws of 1868), by which it was authorized to invest its funds only in certain specified securities.

It was claimed that the defendant loaned the moneys of the bank to Avenue C railroad, and to one D. K. Colburn, upon securities not authorized by the act of incorporation.

The only damage occurring to such bank in consequence of the acts of the defendant, as stated in the complaint, was that such loans remained due and unpaid at the time of the commencement of the action.

To this part of the complaint the defendant interposed a general denial. The defendant also by a supplemental answer pleaded as a defense to the action that Henry Smith, president, and Reeves E. Selmes, secretary of said bank, were jointly liable with defendant for the causes of action alleged in the complaint, and that for a good consideration paid by the said Smith and Selmes to the plaintiff they had been released and discharged from liability on account of said several causes of action, and claimed that thereby the said defendant became also discharged therefrom.

In support of the action on the trial the plaintiff gave evidence tending to show that Henry Smith, the president, Reeves E. Selmes, secretary, and the defendant, as vice-president of the Bowling Green Savings Bank, co-operated in making the alleged illegal loans, and that portions of such loans remained unpaid when the case was tried.

The defendant in answer to the case made by the plaintiff offered to prove the payment by Henry Smith to the plaintiff of the sum of \$45,000 on account of the alleged overdrafts which the evidence showed were the basis of the plaintiff's claim against the defendant.

This evidence was upon objection excluded by the court, and the defendant excepted to such exclusion.

In rejecting this evidence we think the court erred. The allegations in the complaint that the several unauthorized loans made by the defendant remained unpaid at the commencement of the action were necessary and material in order to constitute a good cause of action against the defendant. In the absence of these allegations there would have been shown by the

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complaint no cause of action, inasmuch, as it showed no damage resulting to the plaintiff from the injuries complained of.

It is essential to the maintenance of an action for a tort that damages should accompany the act complained of, otherwise it is *damnum absque injuria* for which no action lies. (*Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *People v. Stephens*, 71 id. 541.)

The mere allegation that the officers of a bank have made illegal loans of the moneys of such bank, or committed other tortious acts, would not show a cause of action in favor of the bank against the officers.

It was, therefore, an essential part of the plaintiff's case to allege the non-payment of the loans in question, from which the damage to the plaintiff might be inferred.

This may not have been very correct pleading on the part of the plaintiff, but it constitutes the only theory upon which the complaint can be held to have stated a cause of action.

A general denial of the allegations of the complaint therefore put in issue the fact of non-payment, and rendered evidence controverting that fact admissible under the answer.

While it is generally true that a defense of payment is inadmissible under a general denial this is not so when the fact of non-payment is alleged in the complaint as a necessary and material fact to constitute a cause of action. (*Van Giesen v. Van Giesen*, 10 N. Y. 316; *McKyring v. Bull*, 16 id. 297; *Quin v. Lloyd*, 41 id. 349.) It is always competent to prove under a general denial any facts tending to controvert the material affirmative allegations of a complaint. (*Quin v. Lloyd*, *supra*; *Beatty v. Swarthout*, 32 Barb. 293; *Howell v. Biddlecom*, 62 id. 131.)

Under the general denial in this case it was competent for defendant to prove any facts tending to show that the plaintiff had not suffered damages to the extent claimed by him. For this purpose he could prove that the moneys illegally taken from the bank had been refunded, either by the alleged borrower or any one jointly liable with himself for the injury complained of. (*Hun v. Van Dyck*, 26 Hun, 567; affirmed, 92

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N. Y. 660.) While a plea of payment by a stranger, between whom and the defendant there is no privity, has sometimes been held to be unavailable as a defense (*Bleakley v. White*, 4 Paige, 654; *Atlantic Dock Co. v. Mayor of New York*, 53 N. Y. 67), yet satisfaction by one joint tortfeasor has always been held to be available as a bar to an action against another. (*Livingston v. Bishop*, 1 Johns. 291; *Thomas v. Rumsey*, 6 id. 31; *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 635; *Woods v. Pangburn*, 75 id. 498.) This rule applies with equal reason to a partial satisfaction by one of the wrong-doers for the damages occasioned by the joint wrongful act of both. Such evidence is proper in mitigation of damages, and under the former practice was admissible under the general issue. (*Daniels v. Hallenbeck*, 19 Wend. 409; *Bush v. Prosser*, 11 N. Y. 347; *Wilmarth v. Babcock*, 2 Hill, 194.)

Without considering the other questions raised on this appeal, we think that, for the reasons stated, the judgment should be reversed and a new trial ordered with costs to abide the event.

All concur.

Judgment reversed.

JAMES N. PAULDING, as Trustee, etc., Appellant, v. THE CHROME STEEL COMPANY et al., Respondents.

Proof that at the time of a transfer or assignment by a corporation it was in fact insolvent is not conclusive evidence that the transfer or assignment was made "in contemplation of the insolvency of such company," within the meaning of the statute (1 R. S. 603, § 4) declaring such a disposition of its property unlawful and void; to come within the prohibition of the statute the act must have been done because of existing or contemplated insolvency.

Money was loaned to a corporation in 1874 under an agreement with it that payment should be secured by chattel mortgage. A mortgage was accordingly executed by the president and secretary of the corporation, with the actual assent of the stockholders, but without the filing of a written assent in the county clerk's office as required by the act of 1871. (Chap. 481, Laws of 1871.) In 1879, the debt remaining unpaid, the

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formal assent of the stockholders was given and filed as required by said act and the act of 1878 (Chap. 163, Laws of 1878), and a new mortgage was executed in lieu of the former one, and in pursuance and fulfillment of the original agreement. At this time the corporation was insolvent. *Held*, the evidence did not authorize a finding that the mortgage was given in contravention of the statute.

As to whether any but the stockholders of a corporation can complain that the statutory condition was not complied with, *quære*.

(Argued December 8, 1888; decided January 15, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made February 8, 1882, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a chattel mortgage, dated October 22, 1879, purporting to have been executed by defendant, the Chrome Steel Company.

The defense was that at the time of the execution of the mortgage the company was insolvent, and that the mortgage was executed in contemplation of insolvency.

The facts, so far as material, are stated in the opinion.

B. F. Tracy for appellant. The failure to obtain the consent of the stockholders, and file the same as required by statute, did not render the first two mortgages void. At most, they were but voidable. (1 Kyd on Corp. 69, 76, 78, 108; Angell & Ames on Corp., § 145; 2 Kent's Com. 282; *Reynolds v. Comm'rs Stark Co.*, 5 Ohio, 204; *White Water Valley C. Co. v. Valette*, 21 How. [U. S.] 414; *Greenpoint Sugar Co. v. Whittin*, 69 N. Y. 328; *Silver Lake B'k v. North*, 4 Johns. Ch. 370; *Nat. B'k v. Mathews*, 98 U. S. 621; *Jones v. Guaranty and Indemnity Co.*, 101 id. 628; *Chester Glass Co. v. Dewey*, 16 Mass. 102; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Leazure v. Hillegas*, 7 S. & R. 313; *Goundie v. Northampton Water Co.*, 7 Penn. St. 233; *Runyon v. Coster*, 14 Pet. 122; *Gold Mining Co. v. Nat. B'k*, 96 U. S. 640; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 604.) But if the first two mortgages were void at law the agreement to give a valid

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mortgage still remained and created an equitable lien upon the property in question. (Jones on Chattel Mortgages [2d ed.], §§ 170-173, note 1; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, 630-644; *Smithurst v. Edmonds*, 14 N. J. Eq. 408; *Geners v. Wright*, 18 id. 330; *McCaffrey v. Wooden*, 65 N. Y. 459; *Hale v. Omaha Nat. B'k*, 49 id. 626; *Weisner v. Ocumpaugh*, 71 id. 113; *Husted v. Ingraham*, 75 id. 251; *Wood v. Lester*, 29 Barb. 145; 1 Story's Eq. Jur., § 64 g; *Dodge v. Williams*, 1 Abb. Ct. of App. Dec. 517; *Craig v. Leslie*, 3 Wheat. 578; *Seymour v. C. & N. F. R. R. Co.*, 25 Barb. 284-302; *Lanning v. Tompkins*, 45 id. 316; *Haverly v. Becker*, 4 Comst. 170; *Delaire v. Keenan*, 3 Dessaus. 74; *In re Howe*, 1 Paige, 125-128; *Dwight v. Newell*, 3 Comst. 185; *White v. Carpenter*, 2 Paige, 217-266; *Arnold v. Patrick*, 6 id. 310-315; *Seymour v. C. & N. F. R. R. Co.*, 25 Barb. 284; *Payne v. Wilson*, 74 N. Y. 348; Willard's Eq. Jur. 442-443; Story's Eq. Jur., § 1503 b; *Whitford v. Gaugain*, 3 Hare, 416.) That the agreement to give a mortgage upon the property in question is one a specific performance of which would be enforced in equity there can be no doubt. (Jones on Mortgages, § 163; Jones on Chattel Mortgages, § 3; *Phyfe v. Wardell*, 5 Paige's Ch. 282; *Crary v. Smith*, 2 Comst. 62; *Dodge v. Willman*, 1 Abb. Ct. of App. Dec. 517; *Hale v. Omaha Nat. B'k*, 49 N. Y. 626; *Hunt v. Rhodes*, 1 Pet. 1-13.) If the plaintiff had either a legal or an equitable lien upon the property, taking another or different conveyance of the same property for the purpose of perfecting the lien, is not a transfer or assignment of property made in contemplation of bankruptcy or insolvency within the meaning of any bankrupt or insolvent statute. (*Clark v. Iselin*, 21 Wall. 360-368; *Cook v. Tullis*, 18 id. 332; *Sawyer v. Turpin*, 1 Otto, 114; *Burnheisel v. Firman*, 11 Bankr. Reg. 505; *Brett v. Carter*, 14 id. 301; *Watson v. Taylor*, 21 Wall. 378; *Tiffany v. Boatman's Savings Inst'n*, 18 id. 375-388; *In re Potts*, Crabbe [Penn.], 469; *Hutton v. Canthvell*, 1 E. & B. 15-20; *Harris v. Rickett*, 4 H. & N. 1-6; *Burdick v. Jackson*, 7 Hun, 498; *Castle v. Lewis*, 77 N. Y. 131; *Hunt*

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v. *Mortimer*, 10 B. & C. 43; 21 Eng. Com. Law R. 29.) A mortgagee of chattels may pursue all his remedies concurrently. (*Jones on Chattel Mortgages* [2d ed.], § 758.)

Winchester Britton for respondent. As the mortgage was executed and delivered in direct violation of the statute (1 R. S. 603, § 4), it was wholly void. (*Bowen v. Lesse*, 5 Hill, 223.) The Chrome Steel Company being actually insolvent at the time the mortgage was made, the statute applies. (*Robinson v. Bank*, 21 N. Y. 406; *Harris v. Thompson*, 15 Barb. 62; *Loring v. Company*, 30 id. 644; 36 id. 330; *Brouwer v. Harbeck*, 55 id. 589; *Walkenshaw v. Perzel*, 32 How. 233; *Herrick v. Borst*, 4 Hill, 650.) The neglect to refile the original mortgages as required by law would have rendered void their lien as against Rowan's judgment. (Laws of 1833, chap. 279, § 13; Laws of 1873, chap. 501, § 3; *Randall v. Dunbar*, 14 Weekly Dig. 332; *Stewart v. Beale*, 7 Hun, 405; affirmed, 68 N. Y. 629; *Thompson v. Van Vechten*, 27 id. 581-583; *Brackett v. Harvey*, 25 Hun, 504; 91 N. Y. 214; *Ely v. Carnley*, 19 id. 498; *Porter v. Parmley*, 52 id. 185; *Best v. Staple*, 61 id. 71; *Steele v. Benham*, 84 id. 634.) There is no force in the suggestion that the clause prohibiting corporations from transferring their property in contemplation of insolvency was repealed by Laws of 1871, chapter 481, or Laws of 1878, chapter 163. (Laws of 1848, chap. 40, § 2; *People v. Smith*, 69 N. Y. 177; 5 Hill, 223.) A mortgage like the one in suit cannot be made to raise money to carry on the business of a corporation. (*Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43, 48, 49-52.)

DANFORTH, J. The material question in this case arises upon the finding of the trial court that the Chrome Steel Company was insolvent, and while in this condition made, and the plaintiff received, the mortgage in controversy, "in contemplation of the insolvency of the company." It was fairly presented by the answer, was the point mainly if not altogether litigated at the trial, and upon it the court declared the mort-

gage invalid. Other points have also been discussed by the respondents' counsel, but we do not think it necessary to decide them, nor that they can fairly come here until after they have been presented to a trial court. As to the one really before us, it is obvious the trial judge disregarded other circumstances in the case, and held the fact of insolvency to be conclusive evidence that the mortgage was made in contemplation of it—that is, of insolvency—and so brought it within the statute which makes it unlawful for any incorporated company “to make any transfer or assignment in contemplation of the insolvency of such company” to any person, and if made, declares such transfer or assignment “utterly void.” (1 R. S., part 1, chap. 18, title 4, § 4, p. 603.)

In this conclusion we think there was error. If correct, it would prevent a corporation in such condition from paying a debt in due course of business, with money, or securing it under any circumstances by assignment of part of its goods or choses in action, although threatened with suit, or actually sued by a creditor, even if by such payment or assignment its officers supposed that the company would be relieved from embarrassment, and enabled to enter a more prosperous career. Yet all these things a debtor might do without having any bankruptcy in view, and it was so held in *Alderson v. Temple* (4 Burr. 2235), and to that effect are *Tiffany v. Boatman's Institution* (18 Wall. 375, 388) and *Dutcher v. Importers and Traders' Bank* (59 N. Y. 5). It would also disregard the distinction clearly intimated in the statute (*supra*, § 4) between a transfer to an officer or stockholder, and one to a person who held neither of these positions, and give it the same meaning as if, like part 1, art. 1, chap. 18, title 2, § 9, 1 R. S., p. 591, it prohibited such assignment or transfer by a corporation “when insolvent or in contemplation of insolvency,” with the intention of giving a preference to any particular creditor.

In *Haxton v. Bishop* (3 Wend. 13) it was suggested by the court that an act to be in contemplation of insolvency must be done before insolvency, or in view of that future condition or state of its affairs expected or contemplated to take place after

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the act was done. This was not altogether satisfactory, and in *Robinson v. Bank of Attica* (21 N. Y. 406) it was held that such construction was too narrow, and that an act in contemplation of existing insolvency was as much within the statute as one done in anticipation of future insolvency. This may be taken, therefore, as the true construction of the statute; but the act in either case must be in anticipation or in view of that condition. In other words, the act must have been done because of existing or anticipated insolvency, or else it is not prohibited. It is not enough that insolvency and the act co-exist. It was accordingly held in *Dutcher v. Importers and Traders' Bank* (*supra*) that payment in the usual course of business, although by an insolvent corporation, was not prohibited nor a sale so made, and as the evidence tended to show that the payment objected to would have been made in the same way had the paying bank been entirely solvent the judgment directed by the trial judge, on the ground that actual insolvency was conclusive evidence of the intent or purpose of payment, was reversed.

The principle upon which that case was decided applies with great force to the one before us. It is obvious not only from the evidence, but, in substance, from the findings of the learned trial judge, that the mortgage was the natural result of a legitimate and honest effort on the part of the company to secure payment of a debt contracted for money borrowed in the usual course of business. The money was advanced under an agreement by the trustees of the company that its payment should be secured by chattel mortgage, and this was executed on the 7th of October, 1874, by its president and secretary, under the direction of its trustees, who were also the only stockholders of the company. It conveyed the property described in the complaint, and after the maturity of the debt in September, 1877, a new mortgage was executed by the same authority in lieu of, and as a substitute for, the one of 1874, conveying the same property and securing the same debt. But in neither case was the written assent of the stockholders, or any of them, filed in the office of the clerk of the county, as required by

the statute. (Session Laws of 1871, chap. 481, § 2.) The debt, however, remained due and unpaid, and prior to the 22d of December, 1879, the formal consent of the stockholders, required by this act and the act of 1878 (Chap. 163), was given and filed, and on that day the mortgage in question was duly executed to secure the same debt, and, as the court finds, "in lieu of, and as a substitute for, the said two prior mortgages and each of them, and for the purpose of giving security, and in pursuance and fulfillment of the original agreement" made by the company "prior to the loaning of the money, and in consideration of, and in reliance upon which the said money was loaned."

It is difficult to see how under these circumstances it could properly be held that the mortgage was given in contravention of the statute, or how in any way the insolvency of the company induced its execution. In the case cited (*Dutcher v. Importers and Traders' Bank, supra*) it is in substance held that a company, although insolvent, may deal with its creditors by making payment, or in the ordinary course of business transfer or sell its property. It follows then that some other fact must be proved before it can be held that a transfer thus made is fraudulent; and in considering that question the date of the agreement pursuant to which any transfer is made, and not the day when the conveyance is in fact executed, is to be regarded.

As between the parties at any rate, the fulfillment of the agreement relates back to the time when the obligation was incurred. (*Ex parte Kevan*, L. R., 9 Ch. App. Cas. 752; *Castle v. Lewis*, 78 N. Y. 131.) Here the finding of the learned judge to which I have above referred, and which is supported by evidence, shows that the motive operating with the company was a desire to discharge the obligation arising from its undertaking to give a mortgage, which should be a valid and sufficient security for the debt contracted. By that undertaking the property now covered by the mortgage was specifically appropriated to that purpose, and as the mortgage is found to have been made in pursuance of that contract, it cannot properly be said to have been executed because, or in contemplation, of

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insolvency. (*Castle v. Lewis, supra.*) "When an act is done that is right to be done," says LORD MANSFIELD, "and the single motive is not to give an unjust preference, the creditor will have a preference" (*Harman v. Fishar*, 1 Cowper, 117), "as if," he adds, "a payment were made, or an act done in pursuance of a prior agreement." So when money is paid under a special contract for repayment out of a certain fund, made when the money was lent, this will not amount to a fraudulent preference, and such payment is said to be not even voluntary. (*Hunt v. Mortimer*, 10 B. & C. 44.)

The statute makes the question depend upon what was passing in the minds of the officers of the company when the mortgage was executed. If they acted in pursuance of a previous contract, by which the company was bound, either in law, or equity, or otherwise, under such circumstances that it could not have a choice, the condition of insolvency became of no moment, for it was not in contemplation, or in their minds. The intention in such a case must be referred to an actual obligation which the debtor was bound to fulfill. (*Ex parte Hodgkin*, L. R., 20 Eq. Cases, 746; *Ex parte Kevan, supra.*) The learned counsel for the respondent argues that the agreement to which I have referred, and under which the mortgage was given, was itself invalid for want of that previous assent which the statutes of 1871 and 1877 (*supra*) required. That assent has been considered by us as exacted for the benefit and protection of stockholders against improvident or corrupt acts of the officers of the corporation, and not because the legislature regarded the mortgaging of corporate property as improper *per se*, and it is at least doubtful whether any but stockholders can complain that the condition was not complied with. (*Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328.) The question, however, does not arise here, for neither the policy of the act nor its beneficent action can be invoked for the agreement was in fact made and the mortgage authorized by all the stockholders. They were, it is true, also trustees, but their assent in that capacity must bind them in both characters. We think the mortgage is good between the

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parties to it, and that the insolvency of the company does not authorize the conclusion of the trial court.

It follows that the appeal was well taken, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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ELIZA C. HOLLENBECK et al., Respondents, v. BARNARD
DONNELL, Appellant.

The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure was inherent in the Court of Chancery before the adoption of the Code of Procedure; it was continued by that Code (Subd. 5, § 244), and is not abrogated by the provision of the Code of Civil Procedure (§ 713), defining cases in which receivers may be appointed; but on the contrary is reaffirmed by the general provision of said Code (§ 4), declaring that each of the courts therein named "shall continue to exercise the jurisdiction and powers now vested in it * * * except as otherwise prescribed."

Where, however, it appeared that but about one-sixth of the mortgage debt was due, and that the premises were divided into two nearly equal parcels, which could be sold separately without injury to the parties interested, *held*, that assuming the appointment of a receiver of the rents and profits was proper, in the absence of a specific pledge thereof, plaintiff was not entitled to a receivership for the protection of that portion of the debt not yet due, or of that portion of the premises as to which his rights to sell had not accrued; and so, was not entitled to a receivership of the whole, but only of one of the parcels.

Hollenbeck v. Donnell (29 Hun, 94), reversed.

(Argued December 4, 1883; decided January 15, 1884.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made January 9, 1883, which affirmed an order of Special Term, appointing a receiver of the rents and profits of the mortgaged premises, in an action for foreclosure. (Reported below, 29 Hun, 94.)

The material facts are stated in the opinion.

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Franklin Pierce for appellant. The rents and profits not having been specifically pledged in the mortgage, the order appointing the receiver was erroneous. (Code of Civil Procedure, § 713; Edwards on Receivers [ed. 1857], 18; 25 Alb. L. J. 267.) The filing of a bill in foreclosure of itself creates no lien upon the rents and profits. (*Lofsky v. Maujer*, 3 Sandf. Ch. 69; Jones on Mortgages, § 667; *Post v. Dorr*, 4 Edw. Ch. 412; *Syracuse City B'k v. Talman*, 31 Barb. 203, 204; *Wagner v. Stone*, 36 Mich. 367; *Hazeltine v. Granger*, 44 id. 503; *Kidd v. Teeple*, 22 Cal. 255; *Seckler v. Delfs*, 25 Kans. 159-165; Civil Code, §§ 2923-2926; *Guy v. Ide*, 6 Cal. 99; *Phoenix Mut. Life Ins. Co. v. Grant*, 3 McArthur, 220; *McMillan v. Richards*, 9 Cal. 410; *Dewey v. Lasion*, 6 id. 609; *Tagarty v. Sawyer*, 17 id. 589; *Chick v. Willels*, 2 Kans. 319; *Goodnow v. Ewer*, 16 Cal. 467; *Vason v. Ball et al.*, 56 Ga. 270; *Best v. Schermmier*, 2 Halst. Ch. 154, 155; Jones on Mortgages, § 772; Taylor's Landlord and Tenant, § 154; 2 Blackstone's Com., § 41; 2 Kent's Com., § 469; Benjamin on Sales [3d Am. ed. Bennett], §§ 115-133; 1 Schouler on Personal Property, 125, 126; Bingham on Sales of Real Prop. 180, 181; *Buckmaster v. Smith*, 22 Vt. 203; *Allen v. Delano*, 55 Me. 113; Thomas on Mortgages, 34; *Morford v. Hamner*, 59 Tenn. 391; 4 Johns. Ch. 537; *E. R. R. Co. v. Ramsey*, 45 N. Y. 637-645.) Courts of equity never attempt to correct permissive waste by injunction or receivership. (4 Kent's Com. 162; *Gardner v. Heartt*, 3 Denio, 232.) Receivers are appointed against the holder of the legal title with great reluctance. (19 Iowa, 186; *Cipp v. Hanna*, 2 Bland [Md.], 26; *Guernsey v. Powers*, 9 Hun, 78; 2 Bliss's Annotated Code, 6.) The remedy of a receiver bears the same relation to courts of equity that proceedings in attachment bear to courts of law. (*C. S. & C. R. R. Co. v. Sloan*, 31 Ohio, 1; *Branton v. Griffiths*, 2 C. P. Div. 212.) The appointment of a receiver of the entire mortgaged premises when only an installment of the mortgage debt was due, and that before judgment of foreclosure, and without a particle of evidence before the court that the premises could not be sold in parcels to pay the mort-

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gage debt, is without a precedent in the judicial history of this country. (2 Jones on Mortgages, § 618, p. 544, notes, 7, 8; *Campbell v. Macomb*, 4 Johns. Ch. 533; Edwards on Receivers, 60; Jones on Mortgages, § 772; *Quincy v. Cheesman*, 4 Sandf. Ch. 405; *Morris v. Blanchard*, 52 Wis. 187; *B'k of Ogdensburg v. Arnold*, 5 Paige, 40, 41.)

F. A. Lyman for respondents. The order appointing the receiver was a discretionary order, and the court at Special Term, and again at General Term having exercised their discretion, the order is not appealable to this court. (*Livermore v. Bainbridge*, 56 N. Y. 73; *Platt v. Platt*, 66 id. 360; *Emmory v. Foster*, 78 id. 624; *Roder v. Bagley*, 84 id. 461; *Fellows v. Heermans*, 13 Abb. [N. S.] 1.) A plaintiff is entitled to a receiver of the rents and profits of the premises in a foreclosure suit, where it appears, first, that the property is an inadequate security for the payment of the debt with interest and costs; and second, that the party who is presumably liable for the mortgage debt is irresponsible, or that no bond or personal security was given or exists. (High on Receivers, § 666; Thomas on Mortgages, 301; Jones on Mortgages, §§ 1521, 1530; 1 Barb. Eq. Pr. 660; 1 Van Santford's Eq. Pr. 391; *Wall St. F. Ins. Co. v. Laro*, 20 How. 95; *Syracuse City B'k v. Tallman*, 31 Barb. 201; *Shortwell v. Smith*, 3 Edw. 588; *B'k of Ogdensburg v. Arnold*, 5 Paige, 38; *Quincy v. Cheesman*, 4 Sandf. 405; *Sea Isle Co. v. Stebbins*, 8 Paige, 565; *Howell v. Ripley*, 10 id. 43; *Astor v. Turner*, 12 id. 436.) The law in relation to the appointment of receivers in foreclosure cases has not been abolished by the Code. (Code of Civil Procedure, § 713, Throop's note, subd. 1; *Ruder v. Bagley*, 64 N. Y. 465; *Lofsky v. Manger*, 3 Sandf. 69; *Hubbell v. Maultran*, 53 N. Y. 227; Code of Civil Procedure, § 4; *Mayer v. Davis*, 8 Weekly Dig. 381; *Ranny v. Payser*, 83 N. Y. 1, 6, 7; *Smith v. Tiffany*, 13 Hun, 671; *Nellis v. Buessing*, 10 Weekly Dig. 289; 18 N. Y. 575.) All that was necessary for the plaintiff to show is, that there was

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such a default as entitled him to commence an action to foreclose the mortgage. (2 Jones on Mortgages, § 1530.)

RAPALLO, J. The Court of Chancery exercised the power of appointing a receiver of the rents and profits of mortgaged premises, when they were an insufficient security and there was no adequate remedy upon the bond, long after the passage of the act of 1828, which provided that no action of ejectment should thereafter be maintained by a mortgagee, for the possession of the mortgaged premises. The point is now urged in the able and exhaustive brief of the counsel for the appellant, that under that statute and the decisions of the courts defining the respective rights of the mortgagor and mortgagee of real estate, the mortgagee has no title to, or lien upon, the rents and profits, unless specially pledged, until after foreclosure and sale. This, however, was not considered by the Court of Chancery in this State a good ground for refusing to the mortgagee the remedy of a receivership in proper cases; and notwithstanding the change in the law of mortgages, the remedy by receivership was continued as before. (*Post v. Dorr*, 4 Edw. Ch. 412.) The Code of 1848 expressly authorized receiverships in certain specified cases, by section 244, and to these, subdivision 5 of that section added, "In such other cases as are now provided by law or may be in accordance with the existing practice, except as otherwise provided in this act." Under this general provision the power of appointing receivers in mortgage cases, continued to be exercised. It is now contended that this power was abrogated by the Code of Civil Procedure, for the reason that section 713 of that code purports to define the cases in which receivers may be appointed; and it is claimed that it contains no provision applicable to mortgage cases like the present one, where the rents are not specifically pledged. It is argued that subdivision 1 of section 713 is not sufficient to cover the case, because it authorizes a receivership of the property, which is the subject of the action, only "on the application of a party who establishes an *apparent right to, or interest in*, the property, which is in the possession of an adverse party, and there is

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danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed;" that under the present law of mortgages the mortgagee having no right to, or interest in, the rents, etc., until after foreclosure and sale, cannot claim the benefit of this section; that subdivision 5 of section 244 of the Code of Procedure is not re-enacted, and, consequently, the power of the court to appoint a receiver in mortgage cases, as formerly exercised, no longer exists, and the former practice in that respect is no longer sanctioned.

We do not think that it was the intention of the Code of Civil Procedure to make this change in the law, or to abolish this power or practice. The language of section 713 is not prohibitory nor exclusive, but permissive and declaratory, and although it does not in terms re-enact subdivision 5 of section 244, an analogous provision is substantially included in the general terms of section 4 of the Code of Civil Procedure, which provides that each of the courts therein mentioned, including the Supreme Court, "shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act." The power to appoint receivers in mortgage cases was inherent in the Court of Chancery before the Code of 1848. It was continued by that code under subdivision 5 of section 244, and it is again reaffirmed by the general provision of section 4 of the Code of Civil Procedure, there being nothing to the contrary in that code. It is not necessary, therefore, to examine critically the provisions of subdivision 1 of section 713, or to discuss the question whether the mortgagee has such an interest in the mortgaged premises, or the rents thereof, as would entitle him, in equity, to a receivership under that section. The codifiers evidently thought that he did, as is shown by Mr. Throop's note to the section; but it is needless to follow the learned counsel for the appellant in his elaborate discussion of that question.

In England, and in some of the States of the Union, the right of a mortgagee to a receivership of the rents and

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profits of the mortgaged premises has sometimes been placed upon the ground of his legal right to the possession of the premises, and consequently to the rents thereof. But in this State it has been placed upon a different ground, and maintained long after any legal estate in the mortgagee ceased to be recognized. The legal right to the rents, as well as to the possession, continues in the mortgagor until foreclosure and sale, as it does in a vendor until conveyance. But when default has been made in the condition of the mortgage, the mortgagee at once becomes entitled to a foreclosure of the mortgage and a sale of the mortgaged premises. This process requires time, and on general principles of equity, the court may make the decree, when obtained, relate back to the time of the commencement of the action, and where necessary for the security of the mortgage debt, may appoint a receiver of the rents and profits accruing in the mean time, thus anticipating the decree and sale. (*Bank of Ogdensburgh v. Arnold*, 5 Paige, 40.) There can be no doubt, that in a proper case where a bill was filed for the specific performance of a contract to convey land, the court might appoint a receiver of the rents accruing during the pendency of the action, for equity treats that as done which ought to be done, and, therefore, considers a conveyance as made at the time when it ought to have been made, and the rents as belonging in equity, to the vendee from the time when he became entitled to the conveyance. On the same principle it may deem the foreclosure of a mortgage completed as of the time when the mortgagee becomes entitled to it. Pursuing the reasoning of the chancellor in *Bank of Ogdensburgh v. Arnold* (*supra*), Vice-Chancellor SANDFORD held in *Lofsky v. Maujer* (3 Sandf. Ch. 69), that when the mortgage debt was due and the security was inadequate, the mortgagee, on filing his bill of foreclosure, obtained an equitable lien on the rents, and he further held in *Quincy v. Cheeseman* (4 Sandf. Ch. 405), that where part only of the debt was due, and the premises were indivisible, or so circumstanced that they must inevitably be sold in one parcel, a receiver of the whole might be appointed, because the mortgagee was by force of the statute entitled to a foreclosure and sale of the property for the pay-

ment of the whole debt, and that this right gave him an equitable claim to the rents on the filing of the bill.

These decisions authorized the framers of the Code to assume that section 713 was sufficient to cover mortgage cases, and it is stated in the note to that section that the words "or interest in" the property (including rents and profits of land) were inserted for the express purpose of covering receiverships in mortgage cases, so that it should not be necessary to establish an *apparent right* to such rents. If there was an equitable lien upon, or claim to such rents, section 713 covers them, and there would certainly be danger of their being lost to the mortgagee, if they went into the hands of an insolvent mortgagor.

This case, as stated in the moving papers, presented strong equities in favor of giving to the mortgagee all the remedies which it was in the power of the court to afford him. The mortgage was given to secure the entire purchase-money of the mortgaged premises (\$3,000). The mortgagor paid nothing, and gave no bond or obligation by which he became personally liable for the purchase-money. The mortgagee had nothing to look to but the mortgaged premises. The mortgagor had, at the time of the commencement of the action, been nearly six years in possession of the premises, and had paid on the mortgage only about \$50 of principal and no interest since May, 1881. In the mean time the barns on the premises had been destroyed by fire, and the mortgagor had received the proceeds of the insurance thereon. The value of the premises had been so far impaired that they had ceased to be an adequate security for the amount unpaid upon the mortgage. A strong case was, therefore, presented for the appointment of a receiver. But a difficulty stands in the way of a receivership of the whole of the mortgaged premises, and the objection is insisted upon by the appellant. It appears that the whole amount of the mortgage was not due, and the moving papers fail to show that the premises were so circumstanced that the plaintiff was entitled to have the whole sold as one parcel. The mortgage was dated July 10, 1875, to secure \$3,000, and annual interest, the principal being payable, \$100

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on the 1st of May, 1881, and \$300 each year thereafter. The action was commenced about May, 1882, the amount then due upon the mortgage being only \$570.72, as alleged in the complaint. The plaintiff was consequently entitled to a sale only of so much of the mortgaged premises as should be sufficient to pay the amount then due. It appears that the premises consisted of a farm, which was divided by a road into two parcels which were not far from equal, and the papers show that these parcels could have been sold separately, without injury to the parties interested; consequently the plaintiff was entitled to a decree for the sale of only one of these parcels. Assuming that, upon the principles before adverted to, the court might have anticipated the decree by appointing a receiver of the rents of one of these parcels, pending the action, we find no warrant for a receivership of the whole. No right to sell both had accrued, and there was no pledge or specific lien by which the accruing rents of that portion of the mortgaged premises which was not liable to be sold were constituted a security to the plaintiff for that portion of the mortgage which was not yet due. He, having omitted to take a pledge of the rents and profits of the whole premises, to keep down the accruing interest and instalments, was not entitled to a receivership for the protection of that portion of the mortgage debt which was not yet due, or of that portion of the premises as to which his right to sell had not yet accrued. (*Bank of Ogdensburgh v. Arnold, supra*; *Quincy v. Cheeseman, supra*.)

On this ground the order must be reversed. We have not considered the judgment entered in this action on the 26th of August, 1882, a certified copy of which has been presented to this court, said judgment not having been in existence at the time of the motion and order for a receivership, and not having been before the General Term on the appeal from that order.

Under the circumstances of the case, the order appealed from should be reversed, without costs.

All concur.

Order reversed.

Statement of case.

PHILIP QUINLAN, Respondent, v. JEREMIAH P. RUSSELL, Impleaded, etc., Appellant.

An ordinance of the city of New York requires the insertion in every contract for work done for the city, of a clause that payment of the last installment due thereunder shall be retained until satisfactory evidence is furnished "that all persons who have done work or furnished materials under such contract," and who have given ten days written notice that a balance is due them, have been fully paid or secured. In an action by a contractor to recover the last installment due on a contract, *held*, that conceding a material-man could by filing the prescribed notice obtain a lien upon the fund in the hands of the city, as to which *quære*, he could not obtain a lien upon the balance due under one contract for materials furnished upon another.

(Argued December 5, 1883; decided January 15, 1884.)

APPEAL by defendant Russell from a judgment of the General Term of the Superior Court, in the city of New York, entered upon an order made April 5, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 15 J. & S. 212.)

The nature of the action and the material facts are stated in the opinion.

L. Laflin Kellogg for appellant. The plaintiff, as assignor of the contractor, Smith, stands in the same relation to and under the contract as Smith, before the assignment was made. (*Schaefer v. Reilly*, 50 N. Y. 61; *Green v. Warwick*, 64 id. 224; *Mechanics and Traders' N. B'k v. Mayor*, 58 How. Pr. 207; 27 Hun, 467; *Murphy v. Mayor*, Daily Reg., May 1, 1883.) The defense of non-joinder, under the Code of Procedure, is a complete defense in itself, and may be pleaded and tried as other defenses. (*Sweet v. Tuttle*, 14 N. Y. 468; *Mason v. Wells*, 2 Hun, 518; *Wooster v. Chamberlain*, 28 Barb. 602.) This defense is sufficiently set up in the answer. (*Prosser v. Matthews*, 26 Hun, 527.) Repeal by implication is not favored, and never allowed except when

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inconsistency and repugnancy are plain and unavoidable. (*Bowen v. Leach*, 5 Hill, 221; Potter's Dwarrior on Statutes, 155, note 5; *Mayor v. Walker*, 4 E. D. Smith, 258; *Wallis v. Bassett*, 41 Barb. 92; *Tone v. Mayor*, 70 N. Y. 162.) The common council had power to pass the ordinance. (Charter of 1857, §§ 1, 2, 38; *People, ex rel. Schenck, v. Greene*, 64 N. Y. 500.) The verified liens presented to the commissioner are presumptively satisfactory evidence to him in the absence of proof to the contrary. (*Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26; *Talcott v. Marine Ins. Co.*, 2 Johns. 130; *Vos v. Robinson*, 9 id. 192.) By the sending of the verified liens to the comptroller's office, the department has done just what that part of the ordinance intended it should do — cause moneys to be retained to meet them. (*Tone v. Mayor*, 70 N. Y. 165.) The value of materials furnished under a contract cannot be recovered on an implied liability. (*McDonald v. Mayor*, 68 N. Y. 23; Laws of 1878, chap. 315.) When one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it. (*Schermerhorn v. Vanderheyden*, 1 Johns. 140; *Lawrence v. Fox*, 20 N. Y. 271; *Howe Machine Co. v. Fagan*, 8 Hun, 174; *Hutchings v. Miner*, 46 N. Y. 460; *Ætna Nat. B'k v. Fourth Nat. B'k*, 46 id. 92; *Brewer v. Dyer*, 7 Cush. 337; *Guernsey v. Rogers*, 47 N. Y. 233; *Coster v. City of Albany*, 43 id. 411; *Hoffman v. Schwab*, 33 Barb. 195.) It is not necessary that the existence of this promise should be known at the time to the third party. It is sufficient if he afterward adopts it. (*Barker v. Bradley*, 42 N. Y. 316.) The acquisition of this money required no further intervention of the debtor. (*Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 195; *Wisner v. Ocumpaugh*, 71 N. Y. 116; *Hale v. Omaha Nat. B'k*, 49 id. 626; *McCaffrey v. Woodin*, 65 id. 459.)

John H. Strahan for respondent. An action may be maintained on a promise made to a third person for the benefit of another, without any consideration passing from such other; but in all such cases it is required that the promise be made

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upon a valid consideration passing from such third person. (*Judson v. Gray*, 17 How. Pr. 289; *Hoffman v. Schwab*, 33 Barb. 195, 196.) To constitute an equitable assignment, there must be an agreement to pay out of a particular fund, and an appropriation of the fund in such a manner that the holder thereof would be authorized to pay it to the creditor without the intervention of the debtor. (*Hoyt v. Story*, 3 Barb. 262.) The clause in the contract, pursuant to the provisions of which the notice to the commissioner of public works is alleged to have been given, is contrary to law, and, therefore, of no force or avail. (*Burke v. Mayor*, 5 N. Y. Sup. Ct. 372; *F. L. & T. Co. v. Carroll*, 5 Barb. 649; *Donovan v. Mayor*, 33 N. Y. 291; Dill. on Mun. Corp., § 55; Laws of 1873, chap. 335, § 91, p. 508; id., chap. 335, §§ 71, 72, 73, 91, pp. 502, 503, 508.) A provision in an ordinance, inconsistent with the provisions of a statute, is repealed. (Dill. on Mun. Corp., §§ 301, 381; *Mayor of New York v. Nichols*, 4 Hill, 210; *People, ex rel. Satterlee, v. Police Comm'rs*, 75 N. Y. 38.) Even where the act of the officers or agents of the corporation (if at variance with the provisions of the statute or ordinance), although inserted in a contract, and the same operates for the benefit of the corporation, it cannot be upheld. (*People, ex rel. Satterlee, v. B'd of Police*, 75 N. Y. 38.) The power of the legislature in regulating the manner in which public work shall be contracted for, and as a consequence the terms and conditions of the contracts for the performance of such work cannot be foreclosed by any contract of a municipal corporation for the doing of such work. (*Matter of Protestant Ep. Ch.*, 46 N. Y. 181.) The authority to retain a portion of the sum to grow due, rests on contract, and is in its nature a license revocable at pleasure. (*Ex parte Colburn*, 1 Cow. 569; *Jamison v. Millemann*, 3 Duer, 255; *Tillotson v. Preston*, 7 Johns. 285; *Mumford v. Whitney*, 15 Wend. 380; *Babcock v. Utter*, 1 Keyes, 115.) The license was terminated by the assignment by the contractor to Gavin of all sums due and to become due under the contract approved by the city. (*Jackson v. Babcock*, 4 Johns. 418.)

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FINCH, J. The rights of the appellant Russell are concluded by the findings of the Special Term. The plaintiff, as assignee of Terence Smith, the original contractor, sued the city of New York for a balance of \$700, alleged to be due and unpaid upon a contract for paving and flagging a portion of Ninth avenue. Russell was made a party defendant because, under a claim that he had furnished material for work done under that contract, he had filed with the commissioner of public works a notice of the non-payment of his demand, whereby he claimed to have obtained a lien upon the balance in the hands of the city. The answer of the city denied any liability to Russell, but at the same time stated a willingness, as all parties interested were before the court, to pay the balance to "such person or persons as the court should direct."

It is at least debatable whether the material-man, filing the prescribed notice, obtained any lien upon the fund in the hands of the city, or acquired any right to recover it either as against the city or against the contractor. But conceding so much, for present purposes only, he certainly cannot, by furnishing materials upon one contract, obtain a lien upon the balance due under another. Smith's contract was for work on Ninth avenue and contained the following clause, viz. : "The said party of the second part hereby further agrees that he will furnish said commissioner with satisfactory evidence that all persons who have done work or furnished materials *under this agreement*, and who may have given written notice to the said commissioner before or within ten days after the completion of the work aforesaid, that any balance for such work or materials is still due and unpaid, have been fully paid or secured such balance." In like manner the city ordinance which authorizes such provision in the contract relates explicitly to "persons who have done work or furnished materials *under any such contract*." It was not enough, therefore, for Russell to show that materials once owned by him had actually been used in the completion of the Ninth avenue contract. He was bound to show that they were furnished under that agreement ; for its performance ; in reliance upon its terms ; and, so to speak, upon its credit. This

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he entirely failed to do. Smith, the original contractor for the work on Ninth avenue, assigned all sums payable therefor to one Michael Gavin, who in turn assigned to the present plaintiff. Gavin was also a contractor with the city for certain work to be done on Eleventh avenue. He swears that all the material furnished by Russell was furnished to him, Gavin, under the Eleventh avenue contract; that it was all carted to that avenue; that the bulk of it was used on that work; that he himself furnished a small part of it for use on Ninth avenue while he was completing that work for Smith, who was bound to the city for its performance. Russell swore differently and raised a question of fact, which the Special Term solved by its finding that "the said Jeremiah Russell performed no work and furnished no material under the said Ninth avenue contract, either for or to the said Terence Smith, or the said Michael Gavin." That ends the case. There was evidence to sustain the finding and it is conclusive in this court.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

NATHANIEL M. BENNETT, Appellant, v. MARY A. BATES et al.,
Respondents.

It is the duty of this court to harmonize the findings of a trial court so as to arrive at the real intention, if it can be done, and an intention to reverse a deliberate finding will not be imputed because of collateral findings in which an inadvertent or immaterial expression is used.

It seems that where a conveyance of land is made subject to the payment of a mortgage thereon, but without an express covenant on the part of the grantee to pay, the disability thus imposed upon him, which prevents him from disputing the validity of the mortgage, may be removed by the grantor by conferring upon the former the right to question the mortgage which the original conveyance withheld.

The mere deduction of the amount of a mortgage from the purchase-price on sale of the lands does not, in the absence of an agreement to pay, absolutely impose upon the grantee the duty of paying or suffering his land to be taken in payment of the mortgage. While it is evidence of the

94	354
109	483
94	354
113	407
113	508
94	354
116	99
116	308
94	354
118	54
118	482
94	354
134	405
94	354
135	365
94	354
158	631
94	354
L163	490
94	354
170	503

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grantor's intention to subject the land to such payment it is not controlling or conclusive; it may be inferred that the deduction was made to protect the grantee against a questionable incumbrance.

Defendant S. purchased for \$15,000 certain premises, upon which she held mortgages amounting to \$11,400. She agreed to give her bond with a mortgage on the premises to secure the purchase-price, from which was to be deducted the amount of her mortgages; these were satisfied and surrendered on receipt of the deed, but a mortgage was presented to her for execution, prepared by the grantee's attorney, for the full amount of the purchase-price, which she executed and delivered in ignorance of the fact that the deduction agreed upon had not been made. There was no special agreement that her mortgage should be given simply for the balance, but she supposed that the amount due her had been or would be deducted. This mortgage was assigned on the day of its execution by the mortgagee to H., his attorney, and by the latter with a guaranty of payment to plaintiff, without any indorsement of payment thereon. In an action to foreclose the said mortgage, *held*, that the satisfaction and delivery by S. of the bonds and mortgages held by her operated as a payment upon the mortgage in suit; that the omission to indorse such payment did not affect her right to claim it; and that she was entitled to the benefit of the payment, even as against a *bona fide* purchaser.

S. sold and conveyed the premises to defendant B., subject to the payment of the mortgage, "if (as was stated in the deed) there shall be found any thing owing and unpaid upon the same." The evidence showed that the whole amount of the mortgage was deducted from the purchase-price. *Held*, that this fact alone did not charge the land with the payment of the full amount; and as the deed disclosed a clear intention on the part of the grantor to convey her interest in the land, and subject it only to the payment of the sum actually owing on the mortgage, this justified a finding to that effect, and such a finding having been made, that the grantee was entitled to the benefit of the payment.

B., with knowledge of the facts, paid to plaintiff \$1,050 specifically as one year's interest on the mortgage. *Held*, that while B. was not estopped by such payment from questioning the validity of the mortgage debt, yet, as it was a voluntary payment upon a disputed claim, she was not entitled to have the excess of the sum paid over the interest actually due applied generally as a payment upon the mortgage.

The mortgage was executed May 10, 1876; the principal was made payable May 10, 1881. *Held*, that plaintiff was entitled to interest at the rate of seven per cent up to the latter date, and at six per cent thereafter.

(Argued December 6, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon

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an order made February 10, 1882, which modified and affirmed as modified a judgment entered upon a decision of the court on trial at Special Term. (Reported below, 26 Hun, 364.)

The nature of the action and the material facts are stated in the opinion.

Samuel Hand for appellant. The court erred in refusing to find as a fact that Mary A. Bates, prior to and at the time of the conveyance to her of said premises, orally agreed, in consideration thereof, and as a part of the purchase-price, to take the conveyance thereof, subject to said \$15,000 mortgage, then held by the plaintiff, this being a material and vital fact in the case, and being established by uncontradicted evidence. (*James v. Cowing*, 82 N. Y. 451, 459; *Davis v. Leopold*, 10 Weekly Dig. 266.) Upon this appeal the fact so conclusively proved and requested to be found should be treated and deemed the same as having been found. (*McCormick v. Penn. C. R. R. Co.*, 80 N. Y. 362, 363.) By Mrs. Bates either taking, or agreeing to take, a conveyance of the premises, subject to the mortgage, and by then and there deducting the amount of it from said purchase-price, the land thereby became primarily liable to pay the mortgage debt, and she took it *cum onere*; and neither Mrs. Simons, nor Mrs. Bates, nor both together, could, without the consent of the plaintiff, for whose benefit such trust in said land was created, afterward discharge it from such liability. (Jones on Mortgages [3d ed.], §§ 736, 744, 1303; *Colgrove v. Tallman*, 67 N. Y. 98; *Johnson v. Fink*, 52 Barb. 396; *S. C.* affirmed, 51 N. Y. 333, 336; *Belmont v. Coman*, 22 id. 438, 440; *Freeman v. Auld*, 44 id. 50, 55; *Horton v. Davis*, 26 id. 495; *Wells v. Chapman*, 4 Sandf. Ch. 312; *Brinsmade v. Hunt*, 3 Duer, 307; *Smith v. Truslow*, 84 N. Y. 660, 662; *Miller v. Thompson*, 34 Mich. 10; *Crawford v. Edwards*, 33 id. 355, 362, 363; *Fuller v. Hunt*, 48 Iowa, 163.) Having taken and kept possession of the premises in question, under purchase and conveyance thereof, subject to the mortgage in suit, Mrs. Bates is now estopped from questioning either the validity or amount of said mortgage. (*Dunning v. Leavitt*, 85 N. Y. 30,

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36; *Hopkins v. Wooley*, 81 id. 78, 85; *Russell v. Dudley*, 3 Conn. 147; *Waterman v. Curtiss*, 26 id. 241; *Green v. Kemp*, 15 Mass. 515; *Tate v. Stevens*, 98 id. 305; *Johnson v. Thompson*, 129 id. 398.) If there is any contradiction or inconsistency between the findings in the decision, and those made in answer to plaintiff's requests, the appellant is entitled to the full and entire benefit of those most favorable to him. (*Bonnell v. Griswold*, 89 N. Y. 122, 127; *Schwinger v. Raymond*, 83 id. 192.) As the deed from Mrs. Simons, containing a covenant to pay this \$15,000 mortgage, was actually delivered either to Hill or Mrs. Bates for Mrs. Bates as early as February, 1877, the latter thereby became the legal owner of the premises, and precluded from defending this action to foreclose it, and is now estopped from denying its validity, and the land in her hands thereby became the primary fund to pay that mortgage debt. (Jones on Mortgages [3d ed.], § 744; *Russell v. Pistor*, 3 Seld. 171; *Freeman v. Auld*, 44 N. Y. 50; *Parkinson v. Sherman*, 74 id. 88, 92; *Campbell v. Smith*, 71 id. 26; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *Ayres v. Dixon*, 78 id. 318; *Crawford v. Edwards*, 33 Mich. 354, 359, 360; *Miller v. Thompson*, 34 id. 10.) It is not open to Mrs. Bates after taking and keeping possession of the premises under her purchase thereof, and under such circumstances, to show when sued either that the mortgage debt did not exist or that it had been paid. (Jones on Mortgages [3d ed.], § 744; *Haile v. Nichols*, 16 Hun, 37; *Henry v. Dailey*, 17 id. 210; *Freeman v. Auld*, 44 N. Y. 50; *Ritter v. Phillips*, 53 id. 586; *Dunning v. Leavitt*, 85 id. 30, 36, 41, 42.) Nor could Mrs. Simons and Mrs. Bates, had they intended to do so, without the consent of plaintiff, by any arrangement between themselves, subsequently made, discharge this liability thus assumed by Mrs. Bates, to pay this \$15,000 mortgage. (*Hartley v. Harrison*, 24 N. Y. 170, 172; *Douglass v. Wells*, 18 Hun, 88, 93, 94; *Barthel v. Elias*, 2 Abb. N. C. 364; *Ranny v. McMullen*, 5 id. 246; *Seaman v. Hasbrouck*, 35 Barb. 151; *Garnsey v. Rogers*, 47 N. Y. 242.) A finding of a judge contrary to the evidence and the admission in the answer is erroneous and

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cannot stand. (*Ballou v. Parsons*, 11 Hun, 602, 605; *Wright v. Delafield*, 25 N. Y. 266.) The language contained in the second deed itself recognizes the mortgage in suit as valid, and estops Mrs. Bates from now denying either its validity or the amount due thereon, except so far as that amount has been reduced by payment, if any, applicable thereto. (1 Jones on Mortgages [3d ed.], § 744; *Conkling v. Secor Sewing Co.*, 55 How. 269; *Lyon v. Adde*, 63 Barb. 90, 98; *Freeman v. Auld*, 50 N. Y. 50; *Hardin v. Hyde*, 40 Barb. 435; *Dunning v. Leavitt*, 85 N. Y. 30, 36, 41, 42; *Hopkins v. Wolley*, 81 id. 77; *Thayer v. Marsh*, 11 Hun, 502, 504, 505; *Miller v. Thompson*, 34 Mich. 10; *Chapin v. Thompson*, 89 N. Y. 271, 276; *Stanton v. Knight*, 1 Simons, 482.) By the previous purchase of the premises subject to the mortgage, and deducting the entire amount of the mortgage debt from the purchase-price, as had been done by Mrs. Bates, the land thereby became the primary fund to pay this entire mortgage debt, and Mrs. Simons became thereby a mere surety for its payment. (*Cosgrove v. Tallman*, 67 N. Y. 98; *Johnson v. Zink*, 51 id. 333, 336; *Smith v. Truslow*, 84 id. 660.) The judge at Special Term erred, in allowing to the defendant Bates, as a general payment upon the mortgage in suit, as already reduced by him to the sum of \$2,761.92, the sum of \$1,050 specified in his decision, as having been specifically paid by Mrs. Bates for one year's interest on said mortgage, which became due thereon on the 10th of May, 1877, and thereby still further reducing the principal sum due upon the mortgage, as he has done. (*Gilleland v. Failing*, 5 Denio, 308; *Ritter v. Phillips*, 53 N. Y. 586, 590; *N. Y. L. Ins. Co. v. Manning*, 3 Sandf. Ch. 58; *Root v. Wright*, 21 Hun, 345, 348; *Gould v. Cayuga B'k*, id. 294; *Morris v. Budlong*, 78 N. Y. 544, 560.) As the answer does not set up the defense of payment, or make any claim to that effect, in respect to the sum so allowed as payment, the allowance thereof by the judge as a payment on the principal sum due on the mortgage was manifestly erroneous and the same should be corrected. (*N. Y. & H. R. R. Co. v. Marsh*, 2 Kern. 308; *Treadwell v. Moore*, 34 Me. 112; *Richard*

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son v. Woodbury, 12 Cush. 279; *Hubbell v. Flint*, 15 Gray, 550; *Clancey v. McEvery*, 17 Wis. 177.) Mrs. Simons did not acquire any "better title" to the premises in question by bidding them off at the foreclosure sale on the Taylor mortgage because she made that purchase for the purpose of clearing the premises of the incumbrance created by that mortgage, "pursuant to her agreement to that effect with Mrs. Bates." (*Mickles v. Townsend*, 18 N. Y. 575; *Carnes v. Platt*, 59 id. 405, 411; *Mickles v. Dillaye*, 15 Hun, 296.) A manual delivery of the deed to Mrs. Bates was not necessary to vest the title in her. (*Schruham v. Weed*, 15 Wend. 545.) Mrs. Bates having paid up the purchase-price to Mrs. Simons, the transaction would vest the entire equitable title to the premises in Mrs. Bates, and make her the equitable owner thereof, and divest Mrs. Simons of all beneficial ownership and interest in the premises. (*Fonda v. Sage*, 46 Barb. 110, 126; *Crawford v. Edwards*, 33 Mich. 355, 362; *Vanderbilt v. Vanderbilt*, 54 How. 250.) The second deed could not have any effect in enlarging Mrs. Bates' title or interest in the premises, or in extinguishing the lien of the plaintiff's mortgage thereon. (*Fonda v. Sage*, 46 Barb. 110, 126; *Schutt v. Large*, 6 id. 373; *Jones on Mortgages* [3d ed.], § 736; *Parkinson v. Sherman*, 74 N. Y. 88.) Plaintiff did not, by releasing the personal liability of Mrs. Simons, discharge the lien of his mortgage upon the land. (*Tripp v. Vincent*, 3 Barb. Ch. 613; *Bentley v. Vanderheyden*, 35 N. Y. 677; *Ranny v. McMullen*, 5 Abb. N. C. 256.)

Charles S. Lester for respondents. Plaintiff can do what his assignor could do and no more. He must stand in his place and accept his title. (*Schafer v. Rully*, 50 N. Y. 61, 66; *Davis v. Bechstein*, 69 id. 440; *Ingraham v. Disborough*, 47 id. 421; *Crane v. Turner*, 67 id. 437; *DeLancey v. Stearns*, 66 id. 157; *Greene v. Warnick*, 64 id. 220; *Trustees of U. College v. Wheeler*, 61 id. 115; *Mickles v. Townsend*, 18 id. 575.) As against the assignee of a mortgage defendant may prove mistake and have the mortgage reformed. (*Andrews v.*

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Gillespie, 47 N. Y. 487.) Equity will enforce the agreement to apply the sum of \$11,196.67 upon the mortgage, and deem it applied whether there was any written indorsement or not. (*Mead v. York*, 2 Sheld. 449; *Davis v. Spencer*, 24 N. Y. 386; *Champney v. Cooke*, 34 Barb. 539.) Mrs. Simons had a right to hold this property, subject only to the amount actually due upon the mortgage and relieved from the burden cast upon it by the fraud of the vendor. (*Bush v. Lathrop*, 22 N. Y. 535; *Seligman v. Dudley*, 14 Hun, 186, 189; *Lathrop v. Godfrey*, 3 id. 739; *Harris v. Eq. Ass. Soc.*, id. 732; *Whitney v. Allaire*, 1 Comst. 305; *S. C.*, 1 Hill, 484; *People v. Stevens*, 71 N. Y. 553; *Isham v. Davidson*, 52 id. 240; *Denston v. Morris*, 2 Edw. Ch. 37; *Hartley v. Tatham*, 26 How. 158; 1 Keyes, 222.) She had the right as against the plaintiff to bring an action and have the mortgage reformed. (*Andrews v. Gillespie*, 47 N. Y. 487.) The mere words, "subject to a mortgage," even when not qualified as they are in this case, imposed no personal liability and do not preclude a grantee from setting up payment or any other valid defense. (*Russell v. Kinney*, 1 Sandf. Ch. 34; *Hartley v. Tatham*, 1 Keyes, 222; *S. C.*, 10 Bosw. 273; *Hale v. Nichols*, 16 Hun, 37; *Stebbins v. Hall*, 29 Barb. 524; *Gage v. Brewster*, 31 N. Y. 218, 221; *Bellmont v. Cowan*, 22 id. 438.) An agent cannot bind his principal by deed unless he has authority by deed so to do. (*Hanford v. McNair*, 9 Wend. 54; *Worrall v. Munn*, 5 Seld. 229; 1 Parsons on Contracts, 110; *Basford v. Pearson*, 9 Allen, 387; *Chauncey v. Arnold*, 24 N. Y. 330; 2 Washburn on Real Property, 555; *Smith v. Fellows*, 9 J. & S. 36.) Evidence of calculations or valuations or conversations preceding the contract were immaterial. They cannot be received to vary the contract, or to show that the premises conveyed were to be paid for in any different manner than is stated in the writings. (*Goelet v. Farley*, 57 How. 174; *Johnson v. Zink*, 51 N. Y. 333.) The plaintiff is not entitled to any benefit from the contract made by Mrs. Simons and Mrs. Bates. (*Vrooman v. Turner*, 69 N. Y. 284; *Garnsey v. Rogers*, 47 id. 233.) If there was any parol, verbal or written agreement on the part of Mrs. Bates with Mrs. Simons to pay

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plaintiff \$15,000 on account of this mortgage, Mrs. Simons subsequently released Mrs. Bates from such agreement. (*Knickerbocker L. Ins. Co. v. Nelson*, 78 N. Y. 137, 153; *Stevens v. Casbacker*, 8 Hun, 116.) The judge was right in refusing to sign the complicated series of propositions presented to him after the cause had been decided, and on the settlement of the case. (Code, § 1023, subd. 32; *Palmer v. Phoenix Ins. Co.*, 22 Hun, 224.)

RUGER, Ch. J. The findings of fact made by the court below fully supported the judgment appealed from, and the appellant must fail, unless he can successfully assail those findings.

The action is brought by the plaintiff, as assignee, to foreclose a mortgage purporting to be for \$15,000, given May 10, 1876, by the defendant, Fannie K. Simons, to one Thomas E. Allen. This mortgage, with the bond accompanying it, was on May 11, 1876, assigned by Allen to one Joseph W. Hill, and were assigned by the latter with a guaranty of their payment to the plaintiff on June 17, 1876. The findings of the court, as well as the undisputed evidence, show that the bond and mortgage were given on the purchase of the mortgaged premises by Fannie K. Simons from Allen, under an agreement to pay therefor the sum of \$15,000, from which sum, the amount due on two certain bonds and mortgages, being about \$11,200, then held by the purchaser against Allen, was to be deducted.

It was further provided by the contract of purchase that a bond and mortgage upon the same premises was to be given by Mrs. Simons to Allen to secure the purchase-price. Simultaneously with the execution and delivery of a deed of the premises from Allen to Mrs. Simons, the latter executed and delivered to the former satisfaction-pieces of each of the two mortgages held by her. At the same time, either through inadvertence or design the mortgage in suit for the full sum of \$15,000 was presented to Mrs. Simons for execution, and she executed and delivered it in ignorance of the fact that the deduction agreed upon had not been made.

The various writings effectuating this transfer were prepared

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by Allen and his attorney, one Joseph W. Hill, and Mrs. Simons relied upon them to see that such papers were in accordance with the agreement between herself and Allen, and she executed and delivered the mortgage, supposing that the sum owing her by Allen had been or would be applied upon the purchase-price of the premises.

There was no special agreement that the mortgage, to be given by her, should be merely for the balance of the purchase-price after deducting the amount of the mortgages held by her against Allen, and it would not alter the legal effect of the transaction whether such deductions were made from the purchase-price and a mortgage given for the balance, or if a mortgage were given for the whole amount and the payments afterward indorsed thereon.

The delivery by Mrs. Simons to Allen of the satisfied bonds and mortgages which she then held against him under the agreement of purchase, operated as a payment upon the \$15,000 mortgage so given to Allen, and rendered such mortgage in his hands inoperative for any sum, save what remained after deducting such payment. The omission of Allen to indorse these payments on the mortgage did not affect the rights of the parties to the transaction. (*Davis v. Spencer*, 24 N. Y. 386 ; *Champney v. Coope*, 34 Barb. 539.) The effect of it was simply to place in the possession of Allen the means of defrauding some prospective purchaser of the bond and mortgage by concealing the fact of such payment, and inducing such purchaser to believe that there was a much larger sum due than was actually owing thereon, but it was totally ineffectual toward imposing a loss upon Mrs. Simons by its enforcement against her as a \$15,000 mortgage. No action could be maintained by Mrs. Simons against the parties who attempted to perpetrate this fraud, to recover damages therefor, for the reason that she has suffered none. The means of protection, not only against Allen, but also against any assignee claiming under him, to shield herself from any loss on account of this transaction were always in her control, and the defense to this suit does not depend upon the theory of a recoupment of dam-

ages arising from a fraud practiced upon Mrs. Simons, but upon the theory of a payment made upon such mortgage by which the sum due thereon was reduced by the equitable application of the amount owing upon the mortgages satisfied by Mrs. Simons.

It is not claimed that an assignee from Allen has any greater or different rights in enforcing the collection of the bond and mortgage than those possessed by the mortgagee himself, unless they arise by force of some subsequent transaction between the parties.

By repeated decisions of this court the doctrine is established that the assignee of a mortgage takes it subject to all of the equities existing between the original parties thereto, and so far as the remedy thereon is concerned stands precisely in the shoes of his assignor. (*Schafer v. Reilly*, 50 N. Y. 61; *Davis v. Bechstein*, 69 id. 440; 25 Am. Rep. 218.)

Conceding this position the plaintiff upon the trial expressly abandoned any personal claim against the mortgagor, and sought to support his claim against the land mortgaged, upon the ground that Mrs. Simons, upon a subsequent sale and conveyance of the premises to the defendant, Mary A. Bates, had expressly charged it with the payment of the mortgage debt, and that said grantee had, by accepting such conveyance, assumed the payment thereof. The legal proposition is not disputed by the defendants that a grantee of real estate, who by his conveyance assumes the payment of a prior mortgage existing thereon, or takes it expressly subject to such payment, is estopped from controverting the existence and validity of such mortgage, but it is denied that any such conveyance was ever executed or delivered to the defendant, Mrs. Bates.

The findings of the court below support the defendants' contention.

It is alleged by the appellant that Fannie K. Simons, in February, 1877, executed a deed of said premises, subject to the payment of the \$15,000 mortgage, and containing a provision whereby the grantee assumed and agreed to pay said mortgage, and intrusted the same to said Joseph

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W. Hill in blank with power to fill in the name of the grantee and deliver such deed to the purchaser of said premises. That said Hill afterward, and about the 3d day of April, 1877, filled in the name of the defendant, Mary A. Bates, as the grantee, and delivered the same to Chester S. Bates as the agent of said Mary A. Bates. There was some evidence to support this allegation, but we think the probabilities as well as the preponderance of evidence show that no such deed was ever executed or delivered. Hill, while refusing to swear positively that the deed was executed by Mrs. Simons, testified that he received such a deed from her and filled in the name of Mary A. Bates as the grantee, and delivered it to Bates about the 3d of April, 1877. He is corroborated by one Jones, who testifies that he saw such a deed and that it was executed by Mrs. Simons. On the other hand, not only does Mrs. Simons testify that she never executed such a deed, but Bates also swears that no such deed was ever delivered to him. The only deed of the premises from Mrs. Simons to Mary A. Bates, which was put in evidence on the trial, was produced by the defendants and proved to be a warranty deed dated the 25th day of September, 1877. This deed Mrs. Simons testifies was the only one ever executed by her to Mrs. Bates of such premises. This deed was not drawn by Hill, and the only reference which it contained to the mortgage in question was as follows: "Subject also to a certain mortgage executed by the party of the first part, to Thos. E. Allen for the sum of \$15,000, bearing date the 10th day of May, 1876, and recorded in the Saratoga county clerk's office on the 12th day of May, 1876, in book of mortgages No. 97, *if there shall be found any thing owing and unpaid upon the same.*" It is also quite significant, that the contract for the sale of these premises by Mrs. Simons to Mrs. Bates, drawn by Hill and executed on the part of Mrs. Simons by him as her agent, and by Chester S. Bates on behalf of Mrs. Bates on the 9th day of February, 1877, originally contained a provision whereby Bates was to assume and pay the \$15,000 mortgage. This contract Bates refused to execute, and that provision was thereupon stricken out and the contract

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executed without providing for such payment. The contract, however, contained a provision by which Bates was to assume and pay the interest on the mortgage amounting to \$1,050, which was described as maturing on the 10th day of May, 1877. It also contained a reference to a deed of the premises from Mrs. Simons to said Bates, which was described as then in the possession of said Hill. This agreement contained no statement of the amount of the purchase-price of the property or the manner of its payment, except a clause reciting that Mary A. Bates had conveyed two certain lots of land in consideration of such sale, and that the deeds therefor had been delivered and were then in the possession of Hill. It was, however, testified by Bates that the price agreed to be paid therefor was \$24,050, and that he was to take the premises subject to the mortgage of \$15,000 and interest, and pay the balance of \$8,000. It appeared that this payment of \$8,000 was made by the conveyance by Mrs. Bates to Hill of the real estate referred to in the contract, and which was estimated to be of the value of \$8,000 exclusive of incumbrances. It also appeared from a statement in the handwriting of Bates that in computing the amount due to Mrs. Simons upon the purchase-price, at the time of the execution of the written contract, he deducted therefrom the amount of the mortgage and interest, viz., \$16,050.

It does not appear, except inferentially, from the evidence of Bates, whether any thing besides the lots described was to be given to Mrs. Simons by Bates on account of the purchase, in case the mortgage was not enforced for its face value against the land. Mrs. Simons testified that "the mortgage and the year's interest was to be paid by Bates, and every thing that had been brought against the property." There is some evidence, however, that Mrs. Simons refused to charge the land directly with the payment of the mortgage, and that Bates always declined when directly asked to assume its payment.

We have thus referred to the most material facts bearing upon this issue, and from which it will be seen that the evidence presented a question of fact strongly supported on either

side, as to whether the land was conveyed, or agreed to be conveyed subject to the assumption by the grantee of the payment of the mortgage. The conflict seems to have arisen almost altogether from the interested efforts of Hill to impose the payment of the mortgage upon the land described therein; the ignorance of the parties as to his real intentions, and the advantage which the confidential position occupied by him toward Mrs. Simons, enabled him to use in forwarding his object. The evidence leaves entirely inexplicable the consideration or understanding upon which Hill not only acquired the possession and ownership of the mortgage in suit immediately after its execution, but also the ownership of the property given by Mrs. Bates in exchange for the mortgaged premises, as well as a barn lot conveyed to him by Mrs. Simons. The only consideration which she seems to have received was the conveyance to her by Hill of some village lots in Rutland, apparently of small value, and which Hill in some way received from the witness Jones. Mrs. Simons testifies that she never received any thing as a consideration for the transfer of the mortgaged premises to Mrs. Bates. It is impossible to resist the conviction that this aged and inexperienced lady has been greatly wronged in the course of these various transactions, and the benefit thereof seems to have been reaped, in part, at least, by Hill. His motives, as well as those of Jones, who seems to have acted in concert with him, are subject to grave suspicions, and fully warranted the determination of the court below in refusing to credit their testimony.

While the admissions of the parties interested, the complications introduced by Hill into the transactions, and the testimony as to the parol negotiations which preceded the conveyance of the property from Mrs. Simons to Bates, might seem to leave some doubt upon the question as to whether the grantee in the deed was to assume the absolute payment of the mortgage in question or not; yet the deed, by which the contract was finally evidenced, is clear and unambiguous, and provides for the assumption by such grantee of the payment only of such sum as shall be actually due and owing thereon. In the absence of evidence

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of fraud or mistake in the execution of this deed, its terms must be deemed controlling upon the rights and liabilities of the parties so far as they are affected by the transfer of the mortgaged premises. It was entirely competent for the parties thereto to merge in the written conveyance the various propositions which had been previously orally discussed, as well as the stipulations which were contained in the written contract of sale; and the conclusion of the court below, that their rights were to be determined by the contract, as thus evidenced, seems to be well supported. (*Kelly v. Roberts*, 40 N. Y. 432; *Knickerbocker Life Ins. Co. v. Nelson*, 78 id. 153.) The recital in the written contract of February, 1877, of the fact that a deed of said premises from Mrs. Simons to Mrs. Bates was then in the possession of Hill, merely furnished some evidence upon the controverted question, and when considered in connection with the circumstances, impeaching the good faith of Hill, who drew the contract and the immateriality of the fact mentioned, so far as the ostensible object of the contract was concerned, was deprived of much of its force as evidence.

It is also claimed by the appellant that there are conflicting findings of fact, made by the court, as to the delivery of the alleged deed to Bates; and that he is entitled to the application of the rule that when there are such findings, that one shall be adopted by the court on appeal which is most favorable to the defeated party.

We are not disposed to dispute or qualify this most salutary rule, but we do not think that the findings of the court below are subject to the criticism made upon them by the appellant. That court repeatedly refused to find that the alleged deed of February, 1877, had been delivered to Mrs. Bates, and expressly found that the deed of September 25, 1877, was the only one delivered.

Among numerous requests to find, proposed by the defendants to the court after the trial, some of which were found and some it declined to find, was the following:

“That immediately after such purchase of said premises by said Mary A. Bates as aforesaid, and before the commencement

of this action, she took possession of said premises under said purchase and conveyance thereof to her by said Simons, and has continued in the undisturbed occupation thereof ever since, to-wit, since about the 1st day of April, 1877." This the court found as a fact in the case.

Notwithstanding the express finding on this point it is argued that inasmuch as Mrs. Bates could not take possession of premises in April, under a deed executed in September thereafter, the court must have intended to find that the alleged deed of February was delivered to Bates on or before April, 1877.

There might have been some force in this argument, if it had been found that she took and continued in possession under this conveyance alone; but such is not the finding, and although the sentence is awkwardly framed, it is susceptible of a construction which renders it substantially true. It must be borne in mind that the appellant is the author of the language in which this finding is couched, and is, therefore, responsible for its incongruity. It specifies four periods of time for the happening of the events therein described, all of which cannot be literally true. First, it indicates that they occurred immediately after the purchase, the evidence shows this date to have been February 9, 1877. Secondly, that it was before the commencement of the action, which is shown to have been in January, 1879; then that it was about the 1st of April, 1877, and lastly during all the intervening time between about the 1st of April, 1877, and the time of trial in November, 1880.

It is strictly true that previous to the commencement of the action and during the greater part of the time mentioned in this finding, Mrs. Bates held and occupied the premises under the conveyance; and the only conveyance which she received from Mrs. Simons, was that of September, 1877. The mere fact that the word "conveyance" was connected with the word "purchase" in describing the time and manner of her original possession was entirely immaterial in the connection in which it was used and the apparent object of that finding. It is our duty to harmonize the findings if we can do so, and arrive at the real intention of the court in making them. We

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think it would be quite absurd to impute to it, the intention to reverse its deliberate finding several times repeated in course of the settlement of the case upon a mere collateral finding in which an inadvertent and immaterial expression was used in describing an irrelevant fact.

The obvious meaning of the finding is that Mrs. Bates went into and continued in possession of the premises under her contract of purchase and deed, and construed in that sense it would be literally true and in accord with the other findings of the case.

It is also claimed by the appellant that the undisputed evidence in the case establishes the fact that the whole amount of the mortgage in suit was deducted from the purchase-price of the mortgaged premises upon their sale to Mrs. Bates, and therefore and by reason of that fact alone, the land became irrevocably chargeable with the payment of such part of the sum secured by the mortgage as was thus deducted.

A brief reference to the principles upon which the property of a grantee has been held liable for the payment of a mortgage debt, resting upon it, shows the fallacy of this claim.

This liability does not rest upon the idea of an irrepealable recognition of the debt, or an irrevocable appropriation of property to its payment, for the right of the grantor to dispute the validity of the mortgage remains unaffected by such a transfer. (*Knickerbocker Life Ins. Co. v. Nelson, supra*; *Cope v. Wheeler*, 41 N. Y. 303.)

When real property has been conveyed subject to a mortgage, with condition in the deed, requiring the grantee to assume the payment of such mortgage, it is held that such grantee by the acceptance of the deed impliedly covenants to pay the mortgage debt, and thus becomes personally liable to the mortgagee for such payment.

In such case it is also held that the grantee is precluded from disputing the validity of the mortgage, not on account of any recognition of its validity or because he is estopped in any way from so doing, but simply because, so far as the interest of the mortgagee in the land is concerned, the right thereto has been

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withheld from him by his grantor. (*Green v. Kemp*, 13 Mass. 515; *Shufelt v. Shufelt*, 9 Paige, 145.)

It is held that a right of action, by reason of the grantee's implied covenant, lies in favor of such mortgagee against such grantee to charge him personally with the payment of the mortgage debt, although the consideration for such covenant proceeds from, and the contract is made between other parties. This is sometimes put upon the ground that the grantor, being personally liable to pay such mortgage, and having furnished the consideration by which another assumes his covenant, becomes a surety merely, and the promise will, therefore, inure to the benefit of the creditor through an equitable subrogation to the right of appropriating securities held by his surety for the payment of the principal debt; and sometimes, as in *Burr v. Beers* (24 N. Y. 179), *Garnsey v. Rogers* (47 id. 233; 7 Am. Rep. 440), upon the ground that a right of action accrues to a person for whose benefit a promise is made, although he is a stranger to the contract and consideration.

To obtain the benefit of this principle it is essential that a mortgagee should establish not only a liability on the part of the grantor to himself for the mortgage debt, but also such a contract between the grantor and grantee as obligates the latter to pay such debt. (*Garnsey v. Rogers*, *supra*.)

This, as we have seen, has not been done in this case.

It was decided in *Hartley v. Harrison* (24 N. Y. 170) that upon a right of action accruing on such covenant to the mortgagee it was not within the power of the grantor by subsequent conveyance or agreement to release the grantee from his obligation without the consent of the mortgagee.

This doctrine has not, as we have discovered, been extended to conveyances of land subject to a mortgage unaccompanied by covenants for its payment. The authorities hold where a grantee takes a conveyance of land, subject to the payment of a mortgage existing thereon, although he comes, under no personal liability to pay the same, is not at liberty to contest the existence or validity of such mortgage. This proposition proceeds upon the theory that under such a conveyance, the grantee

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therein takes only an equity of redemption in the premises, and, therefore, holds no such title as enables him to secure more than the interest which was intended to be conveyed to him. He is not the privy either in contract or estate of his grantor. (*Sands v. Church*, 2 Seld. 347; *Hartley v. Harrison*, 24 N. Y. 170; *Johnson v. Zink*, 51 id. 336.)

It is unquestionable that the owner of real property, apparently incumbered by usurious or otherwise invalid mortgages, may convey it in such manner as to enable his grantee to avail himself of such defenses to the enforcement of the mortgages, as exist in favor of the owner. By receiving the absolute title and interest, the grantee becomes the privy in estate of his grantor, and takes the property, subject to the same conditions, and entitled to the same rights as pertained to it in the hands of his grantor. (*Post v. Dart*, 8 Paige, 640; *Cole v. Savage*, 10 id. 583; *Dix v. Van Wyck*, 2 Hill, 522; *Merchants' B'k v. Com. Warehouse Co.*, 49 N. Y. 635; *Mason v. Lord*, 40 id. 476.)

Where, therefore, a grantor conveys a limited right in his property while possessing the power of conveying a greater interest, it follows that such interest as is not thereby conveyed still remains in the grantor, and is capable of being subsequently transferred by him through a conveyance vesting his grantee with the title, discharged of the obligation to pay invalid incumbrances. (*Cope v. Wheeler*, 41 N. Y. 311; *Berdan v. Sedgwick*, 44 id. 626; *Knickerbocker Life Ins. Co. v. Nelson*, 78 id. 153.) The cases which hold that a grantee of premises, who obtains title thereto under a conveyance making them subject to a mortgage, cannot contest the validity of such mortgage, do so upon the theory that he labors under a disability imposed upon him by his grantor, who has intentionally retained to himself the privy which enables a party to dispute the validity of an apparent lien upon the premises granted.

We see no reason why the grantor does not possess the power to remove this disability by afterward conferring the right which by his prior conveyance he simply withheld from his grantee. While we have been referred to no case which holds

that the mere deduction of the amount of a mortgage from the purchase-price on the sale of lands imposes upon the grantee the duty of suffering his land to be taken in payment of such mortgage, yet we are of the opinion that this fact affords some evidence of the intention of the grantor to subject the property conveyed to the payment of such mortgage. But we also think that such a fact unaccompanied by an agreement to pay the mortgage debt is merely evidence of the existence of the intention, and is neither controlling nor conclusive. It may very well be inferred that such deduction was made for the protection of the vendee against the questionable incumbrance, in which case the mortgagee could derive no benefit from it. (*Berdan v. Sedgwick*, 40 Barb. 362; affirmed, 44 N. Y. 626; *Cope v. Wheeler*, *supra*.)

Upon whatever principle the liability in such case may be predicated, it still depends altogether upon the intent of the grantor in creating it, and if she was under no moral or legal obligation to pay the mortgage debt it would require stronger evidence than exists here to impute such an intent to her from that fact alone. Certainly it would require but slight evidence to overthrow the inference to be drawn from such a circumstance.

The most reliable evidence of the intention of the grantor in making such a transfer of her property must be found in the deed by which the transfer is made, and when that shows, as it does in this case, a clear intention to convey the grantor's entire interest in the land, and to subject it to the payment only of the sum actually owing upon the mortgage, it must be held to be at least sufficient evidence to support a finding to that effect by the trial court. Such a conveyance vests the grantee with the title as it was possessed by the grantor, and enables her to dispute the validity of any claim against the land conveyed, which was open to the grantor to contest. (*Hartley v. Harrison*, *supra*; *Berdan v. Sedgwick*, *supra*; *Sands v. Church*, *supra*.)

We, therefore, think that the defense existing against this

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mortgage was available to the defendant Mrs. Bates, and was sustained by the evidence.

The further question is made that the court below erred in deducting the payment of \$1,050, made by Mrs. Bates to the plaintiff, from the amount actually owing upon the mortgage, instead of applying it as a payment of a year's interest thereon. This point is founded upon the claim that such payment having been made specifically for a year's interest upon the mortgage, the defendant Bates is, therefore, precluded from claiming its benefit, as a general payment upon the mortgage.

It having been found by the court below that the mortgage in suit was a valid incumbrance upon the premises mortgaged for only about \$4,000, it follows that at the time of this payment the sum of \$1,050 was not due and owing thereon for interest.

The question is, therefore, presented whether the defendant Bates is precluded from claiming the benefit of this limited liability, by reason of the payment of \$1,050, specifically as interest upon the mortgage in question. To authorize the application of so much of this sum as is in excess of the amount actually due for interest, as a payment upon the mortgage generally, is equivalent to holding that she has the right to recover back that sum by suit from the mortgagee. It is not claimed but that this sum was paid with full knowledge of all the facts attending the transfer of the property mortgaged, and the defenses existing against the mortgage, nor but that the plaintiff claimed that his mortgage was a valid lien for its full amount upon the property therein described. Although we cannot see that by reason of this payment the defendant Bates is estopped from questioning the validity of the mortgage debt, inasmuch as the plaintiff has not changed his position or been prejudiced thereby (*Waring v. Somborn*, 82 N. Y. 604), or that it is affected by the rules governing the application of payments upon valid debts of a distinguishable character, yet it seems to us that this must be held to be a voluntary payment upon a disputed claim, and as such is not recoverable back by the person making it. (*N. Y. & H. R. R. Co. v. Marsh*, 12

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N. Y. 308; *Ritter v. Phillips* 53 id. 537; *Flower v. Lance*, 59 id. 603.)

The disposition of the defendant's claim to have the amount of the Taylor mortgage applied upon the mortgage in suit as a payment thereon by way of recoupment was properly made by the General Term for the reasons stated in the opinion of Judge RUMSEY.

The views above expressed lead to a reversal of the judgment, and an order for a new trial with costs to abide the event, unless the defendants Chester S. and Mary A. Bates stipulate to allow judgment to be entered in favor of the plaintiff herein, as ordered by the court at Special Term, modified so as to provide for the recovery of a principal sum of \$3,803.23, with interest thereon at the rate of seven per cent per annum from May 10, 1877, to May 10, 1881, and at six per cent thereafter; and in case such stipulation be given, the judgment, as it shall be thus modified, should be affirmed, without costs of this appeal to either party.

All concur.

Ordered accordingly.

WILLIAM H. VOSBURGH, Respondent, v. THE LAKE SHORE AND
MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

Where a railroad corporation purchased the line of another company, of which an existing bridge formed a part, which bridge at the time of the purchase was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector, and could have been easily and surely ascertained by proper examination, *held*, that it was negligence on the part of the corporation to continue its use without such an inspection and a correction of the defects; that it was liable to an employe upon one of its trains for injuries received by a fall of the bridge; and this, although the bridge had been in use for several years before the purchase.

Dealin v. Smith (89 N. Y. 470), distinguished.

It seems that the prior use might have justified a continuance of the use until a competent inspection could reasonably have been made, but did

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not justify a neglect, to observe and remedy the defects when an inspection was made.

(Argued December 7, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of plaintiff, entered upon an order made April 8, 1882, which denied a motion for a new trial and directed judgment on a verdict.

This action was brought to recover damages for injuries sustained by plaintiff while in defendant's employ as a brakeman, in consequence of the falling of a bridge, as a train, upon which plaintiff was, was passing over it.

The material facts are stated in the opinion.

James F. Gluck for appellant. Assuming that the bridge fell by reason of certain defects inherent in its original construction, and not the result of use, and which defects, therefore, existed prior to the time at which it came into the defendant's possession, it was error on the part of the court to submit to the jury that question as one, the affirmative answer to which would result in establishing negligence on the part of the defendant. (*Devlin v. Smith*, 89 N. Y. 470, 476.) The request to charge "that if the defendant employed competent and trustworthy agents to examine and take charge of this structure, who assumed to do so during the time that it was the owner of or occupied the bridge, the defendant is not liable," should not have been denied. (*Wood's Master and Servant*, §§ 346, 348, 368; *Painton v. N. Cent. R'y Co.*, 83 N. Y. 7, 12.)

Adelbert Moot for respondent. The defendant was bound to furnish plaintiff with a reasonably safe bridge to pass over, and failing so to do, is liable. (*Swords v. Edgar*, 59 N. Y. 28; *Shearman and Redfield on Negligence*, §§ 93, 95; *Davis v. C. V. R. R. Co.*, 55 Vt. 84; 27 Alb. L. J. 106.) While it is true the defendant did not construct this bridge originally, having purchased it of a company that built it, and put it in use, it

should be held to the same rule as if it had constructed it; it was the occupant of the bridge, and hence primarily liable. (*Swords v. Edgar*, 59 N. Y. 28; *Ryan v. Wilson*, 25 Alb. L. J. 175.) It was a clear case of imperfect and inadequate means and appliances and imperfect machinery. (*Lansing v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 521; 7 *Lans.* 70; *Shearman and Redfield on Negligence*, § 92.)

FINCH, J. The plaintiff was a brakeman in the employ of the defendant company, and was injured by the fall of the bridge at Ashtabula on the 29th of December, 1876. He has recovered a judgment for damages, which is now sought to be reversed, upon the ground that there was no sufficient proof of negligence to carry the case to the jury. The bridge was built of iron, and spanned a gulf leading inland from the lake, and growing narrower as it approached the point of crossing. It was a deck bridge, constructed upon what is known as the Howe truss plan, frequently applied in the building of wooden bridges, but apparently in this one instance alone, made wholly of iron. It was originally constructed in 1864, by the Cleveland, Painesville and Ashtabula Railroad Company, a predecessor of the present defendant. The history of its construction is not encouraging. The superstructure was planned by Amasa Stone, who appears to have had a large experience in the designing and construction of railroad bridges, and at the time was president of the company for which the bridge was to be erected. Stone, however, merely "directed the method of making the plans," "and the method of carrying it out," "in general terms through agents and practical employes." He employed one Tomlinson "to make the design and draft of the structure, and the specifications and details." With reference to his capacity, Stone says only that he had been in his employ for about fifteen years, "more or less in the erection of *some* bridges," and that he regarded him as competent to execute the work under his, Stone's, "general directions." But Tomlinson evidently bungled his work, making the top chords too short, and planning to put in the braces with their webs hori

zontal instead of vertical; errors which so "annoyed" Stone that he "intimated to him that his resignation would be accepted, and put another man in charge." Who that was and what may have been his capacity we are not informed. These errors had to be corrected. In doing it, the top chords were elongated by inserting between their members thin plates of iron, called shim pieces, held in their places merely by the dead weight of the bridge and the loads upon it; the office of the top chords and braces under them being mainly to resist compression. When the position of the braces was altered, a few more were added, and this change compelled the chipping away of the lugs on the angle blocks in order to give the braces a fair bearing, and then some of them, crowded by the vertical rods, did not rest fully upon the angle blocks. The iron work for the bridge was done by Congdon, whose principal business appears to have been the construction and repair of locomotives, and who held the position of master mechanic.

The superstructure was put together and erected by one Rogers, who was a carpenter. The result which followed was not surprising. The bridge was put in its place and its members united by the aid of bents built up from the ground below, and when the blocks upon them were removed, the bridge sagged below a horizontal line. That occurred twice. The difficulty was sought to be remedied the first time by the lengthening of the top chords, which proved ineffectual, and the second time by the change in the braces. After that the top chords seem to have preserved their camber of two and one-half inches, and the bridge went into use, at first with a single track and later with a double track, and stood for about ten years, until its fall in 1876.

Upon all these questions of original plan and construction experts were examined. Their opinions differed, as is very common in such cases. But upon two things they agreed. Nobody disputed the mechanical axiom that the strength of a bridge is that of its weakest part, nor the rule of prudence that its factor of safety should have been five, when in truth it was only about three; that is, the bridge should have been

five times as strong as its breaking weight under expected loads, but was only of about three times that strength. As to other alleged defects—in the yoking of the main braces, so that each I beam acted independently instead of solidly as one; in the insufficiency of the lateral bracing; and the alleged movement or change of position of the braces upon the anchor-blocks—there was much difference of opinion and considerable contradiction in the evidence.

Enough has been said to indicate the questions of fact existing in the case, unless it be true that the defendant company was not responsible for any of the alleged defects because it acquired the bridge by purchase, as a completed and to some extent as a tested structure. In other words, the contention is, that a railroad company acquiring by purchase an additional line already built and in operation, of which an existing bridge forms a part, owes no obligation to its employes running trains over such bridge, except to keep it as good as when it was bought, and has a right without negligence to assume the sufficiency of its original plan and construction. The case relied upon for this doctrine is *Devlin v. Smith* (89 N. Y. 470; 42 Am. Rep. 311), but it has no application for two reasons. Smith, having no knowledge of scaffold-building, employed a builder known to him to be skillful and experienced, and owed to no one a duty of inspection, the proper performance of which would have disclosed the defect. The defendant here bought the bridge of another railroad company, and without any selection or choice of the builder. If Smith had found the scaffold already built and in the ownership of a person not an expert or scaffold-builder, and had bought it of such third person without knowing who designed it, or the plan and manner of its construction, and without inspection had sent his men upon it, a very different question would have been presented. And if the scaffold instead of a temporary had been a permanent structure, intended for continuous use through the years, and imposing upon Smith the duty of an inspection by skillful and competent agents, whose proper performance of that duty would have disclosed defects of construction which made it dangerous and unsafe,

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again a different question would have been presented. Assuming as we must what the jury could have found from the evidence, that the bridge when purchased was unsafe and dangerous by reason of defects in its original plan and construction, and which defects were obvious to the eye of a skilled inspector, and easily and surely ascertainable by a structural analysis determining its factor of safety, it was negligence on the part of the defendant to continue its use in the face of such obvious defects without ascertaining their effect upon its strength and capacity. The purchasing company either knew or did not know the facts relating to its original construction. It is probable that they knew them. Their chief engineer, Collins, whose duty it was to inspect this bridge, and who did so, was the engineer of the constructing company. He built the abutments of this very bridge, and in all probability knew that the general plan was dictated by a man busy about every thing else; that its draftsman and actual designer made mistakes and was discharged because of them; that the man who put it up was a carpenter without experience in iron bridges; and that the structure was altered and modified twice before it would bear its own weight. If the defendant company through its chief engineer knew this, it knew enough to be guilty of negligence, if it relied upon such a plan and construction without further investigation, and in sole reliance upon the fact that it had not yet fallen. But if the company did not know it, if it bought the bridge in ignorance of who built it, and the character and safety of its plan, and used and inspected it without even knowing or ascertaining its factor of safety, or the prudence of its design, although warned by the presence of obvious defects, they simply shut their eyes and took the risk on the sole faith of its previous use. Collins is said to have been a competent man. Year after year he examined this bridge, but always on the assumption that his sole duty was to see that every thing was in place and that no signs of weakness were developed by the test of passing trains, and never once to ascertain the safety of its plan and design. The defects pointed out by the evidence were almost all obvious to the eye of a com-

petent examiner. A structural analysis, easily made by such an examiner, would have shown that instead of a factor of safety of six times its breaking weight, as Stone says he intended, it had but half that strength and was far below the ordinary standard of safety.

The learned counsel for the appellant insists that the defendant did employ suitable and competent persons to inspect the bridge, who did make the usual and customary examinations, and that there is no dispute about that in the evidence. But it is plain that the inspection described in the proofs as customary is that made by a company which has built its own bridges. In such case it already knows the plan and mode of construction, and is already responsible for the lack of reasonable care in either the design or its execution. The subsequent inspection is directed only to its perfect repair, and to indications of weakness. But where the company does not know either the safety of the plan or the prudence of the construction because it has purchased it completed, and in use, and knows nothing of the skill or want of skill of the builder, an inspection which takes no heed of that inquiry when defects are obvious, and lack of safety is indicated and may be easily ascertained, is not sufficient. The employer must exercise reasonable care in furnishing the servant with the means and implements of his service. That the master does not do when he buys an unsafe and defective bridge, whose obvious deficiencies give warning of possible danger, and sends his servants upon it without inquiry as to the skill of its construction or safety of its design. The servant is entitled to that care whether the master builds the bridge or buys it. The risk and the injury are the same in either case. Of course the test of actual, previous use goes for something. It might justify a continuance of that use until a competent inspection could reasonably be made, but would not justify a neglect when it was made to observe and remedy obvious defects and elements of danger, because existing in the original plan, and an omission to learn by a well-understood process whether in view of its apparent defects it had the ordinary surplus of strength. Upon railroad bridges, every

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day and almost every hour, the lives of passengers and of employes are trusted. It is not requiring too much to insist that, whether built or purchased, the company shall take reasonable care to know or ascertain the safety of their design and construction, and shall be charged with knowledge of defects which a competent examination would have disclosed.

It is apparent, therefore, that in this case there were questions of fact for a jury. Whether the bridge was in truth defective in particulars, not latent or undiscoverable, but open and obvious to the eye of a skilled and faithful inspector; and whether that inspector did make such an examination as reasonable care required and the company should have exacted in the exercise of such care under the existing circumstances, and in view of such obvious and apparent defects, were questions of fact in the case, and properly submitted to the jury.

The judgment should be affirmed, with costs.

All concur, except ANDREWS, J., who took no part.

Judgment affirmed.

COTTON W. BEAN, Respondent, v. LAURENT J. TONNELE, Appellant.

Where an action was brought against the maker, upon a promissory note more than twenty years after the same fell due, *held*, that although the statute of limitation was not a bar because of non-residence of defendant, yet that the lapse of time raised a presumption of payment.

It appeared that defendant executed the note for the accommodation of the payee, who indorsed the same to plaintiff; that said payee was dead, but that for a period of seventeen years after the note fell due he was within the jurisdiction of the court. Defendant then offered to show that plaintiff was in indigent circumstances during this period; this was objected to and excluded. *Held* error; that the evidence was proper as tending to fortify the presumption of payment or satisfaction.

Also *held*, that the error was not cured, or the objection waived, by the rejection, upon defendant's objection, of evidence offered by plaintiff, tending to explain the delay in bringing suit.

(Argued December 7, 1883; decided January 15, 1884.)

94	381
119	610
94	381
125	744
94	381
130	406

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APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made April 6, 1882, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

C. W. Pleasants for appellant. The burden of proof is upon the plaintiff to show that the note in controversy has not been paid, as payment may be presumed from lapse of time. (*Flag v. Ruden*, 1 Bradf. 195; *Jackson v. Sackett*, 7 Wend. 94; *Barr v. Williams*, 6 Pick. 187; *Oswald v. Lugh*, 1 T. R. 271; 3 Starkie on Ev. 823; *Cooper v. Turner*, 2 Stark. 497; *Cent. B'k of Troy v. Haydon*, 48 N. Y. 260; *Lyon v. Odell*, 65 id. 28; Angell on Limitations, 10, 80, 96.) The circumstances of the debtor and creditor are evidence to increase or rebut the presumption so created. (*Ross v. Darby*, 4 Munf. 428; *Gratham v. Canaan*, 38 N. H. 263-270.) The fact that defendant was of sufficient pecuniary ability to pay its obligations raises a presumption that the note has been paid. (*Miller v. Smith's Ex'rs*, 16 Wend. 425; *Garner v. Sandford*, 2 Sandf. 440.) Waiting until the death of Deegan before suits brought increases the presumption. (Wharton on Evidence, § 1363.) Twenty years neglect of collection is a sufficient period to ground the presumption of payment of a bond. (*Rogers v. Judd*, 5 Vt. 236.) The residence in New Jersey does not rebut the presumption. (*Keline v. Keline*, 20 Penn. St. 503.) As under the Revised Statutes, and the Code of Civil Procedure, § 376, judgments are conclusively presumed to be paid after twenty years, therefore *a fortiori* of the note in suit is conclusively presumed to have been paid. (*Ross v. Darby*, 4 Munf. 428; *Malloy v. Vanderbilt*, 4 Abb. N. C. 127.) When the statements of a witness are grossly improbable, or he has an interest in the question at issue, courts and juries are not bound to blindly accept the statements of such witness, but may exercise their judgment. (*Elwood v. W. U. Tel. Co.*, 45 N. Y. 549.)

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Nathaniel C. Moak for respondent. The making and delivery of the note to the payee being admitted by the answer, the production of the note on the trial by the plaintiff, with proof of indorsement by the payee, was *prima facie* evidence that the plaintiff became the owner of the note before maturity, for value, in good faith. (*Collins v. Gilbert*, 94 U. S. 753; *Bedell v. Carl*, 33 N. Y. 581; *Barlow v. Meyers*, 64 id. 46; *M. & T. B'k v. Crow*, 66 id. 87.) A valuable consideration for an indorsement is presumed. (*Riddle v. Mundeville*, 5 Cranch, 322.) In the absence of any restriction as to the use of accommodation paper, the person to whom it is given, by way of accommodation, may make any legitimate use of it he pleases. (*Hager v. Worrall*, 69 N. Y. 371; *M. & T. B'k v. Crow*, 60 id. 85, 87; *Rose v. Bedell*, 5 Duer, 462; *Collins v. Gilbert*, 94 U. S. 753.) If defendant, after giving evidence that the note was made by him for the accommodation of Deegan, desired to raise the point that plaintiff must prove payment of a consideration to Deegan before he was entitled to recover, he should have done so at the close of the evidence. (*Osgood v. Toole*, 60 N. Y. 475; *McKeon v. Lee*, 51 id. 300; *Tracy v. Altmeyer*, 46 id. 598, 600; *Spooner v. Keeler*, 51 id. 562; *Thayer v. March*, 75 id. 342.) Defendant having resided in New Jersey until 1876, and the action having been begun prior to April, 1881, the statute of limitations was not a bar. (Old Code, §§ 91, 100; Code of Civil Procedure, §§ 382, 401.) The fact of his being in New York occasionally, or even frequently on business, did not cause the statute to run. (*Murray v. Fisher*, 5 Lans. 98; *Bennett v. Cook*, 43 N. Y. 537; *Rockwood v. Whiting*, 118 Mass. 337; *Bell v. Lampley*, 57 N. H. 170-1.) Although payment may in some cases be presumed from a long lapse of time, where the creditor gives no evidence to rebut the presumption or explain the delay, yet it has never been held that mere lapse of time paid a debt. (*Johnson v. A. & S. R. R. Co.*, 54 N. Y. 424, 426, 427; *Dean v. Hewitt*, 5 Wend. 257; *Pinkerton v. Bailey*, 8 id. 600; *Soulden v. Van Rensselaer*, 9 id. 293; *Sands v. Gelston*, 15 Johns. 511; *Bell v. Morrison*, 1 Peters, 351.) The declarations of Deegan

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to the defendant, in the absence of plaintiff, were properly excluded. (*Page v. Cagwin*, 7 Hill, 361.)

ANDREWS, J. This action was commenced October 18, 1880, upon a note dated May 12, 1859, for \$650, payable six months after date, made by the defendant, payable to the order of one Timothy Deegan, who died in 1876. It was indorsed by the payee in blank, and the plaintiff claims to recover as indorsee. The note was made in Jersey City, where both the maker and payee resided when it was made, the plaintiff then and ever since being a resident of New York. The payee, Deegan, removed to the city of New York in or about the year 1860, and subsequently resided there till his death. The defendant continued to reside in Jersey City until the year 1876, when he also removed to the city of New York. The defendant testified that he made the note for the accommodation of the payee, and this evidence was not controverted. It does not appear upon what consideration the plaintiff received it. He was a witness on the trial, but reposed upon the presumption arising from the possession of the note that he was a holder for value. A declaration of Deegan, made in 1869, was proved without objection, to the effect that the plaintiff had trusted him, and now that he was hard up, he (Deegan) would trust him with a note. What note he referred to, does not appear.

The defendant in his answer set up the statute of limitations, and also the defense of payment. The answer of the statute was not available for the reason that the defendant was a non-resident of the State from the date of the note until 1876, and the action was commenced within six years after that time.

The defendant to maintain the defense of payment, relied upon the lapse of time between the making of the note and the commencement of the action, and offered certain evidence bearing upon the issue, which will be hereafter referred to. It was a rule of the common law that the payment of a bond or other specialty, would be presumed after the lapse of twenty years from the time it became due, in the absence of evidence explaining the delay, although there was no statute

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bar. The rule is said to have begun in courts of equity (15 Vin. Abr., Length of Time, pl. 5, 6), but from an early time it has been recognized by courts of law. (*Anon.*, 6 Mod. 22; *Oswald v. Legh*, 1 T. R. 270.) In this State it was frequently applied prior to any statute provision on the subject, and in connection with other circumstances the presumption was allowed to prevail within the period of twenty years. (*Clark v. Hopkins*, 7 Johns. 556; *Jackson v. Pratt*, 10 id. 381; *Flagg v. Ruden*, 1 Bradf. 192, and cases cited.) In respect to simple contracts the same presumption has been applied after the lapse of twenty years. Lord HOLT in 6 Mod. 22, which appears to have been an action on a bond, speaking of the presumption in that case said, "*a fortiori* upon a note, if it be any considerable sum." In *Duffield v. Creed* (5 Esp. 52), which was an action brought in 1803, upon a note made in 1782, Lord ELLENBOROUGH said, "If this had been a bond, twenty years would have raised a presumption of payment in which case he would have left the presumption to the jury, and he thought, as this note was unaccounted for, the same rule of presumption ought to apply." The presumption has been applied to simple contracts in several cases in this country. (*Perkins v. Kent*, 1 Root, 312; *Daggett v. Tallman*, 8 Conn. 168; *Wells v. Washington's Adm'r*, 6 Munf. 532; *Bass v. Bass*, 8 Pick. 187.) In *Jackson v. Sackett* (7 Wend. 94), many of the cases on the presumption arising from lapse of time were referred to, and it was held that the presumption was one of fact and not of law, and that it was for the jury to draw the conclusion upon all the facts and circumstances of the case.

We have referred to the cases upon this subject, with a view to the alleged errors of the trial court in rejecting evidence offered by the defendant to show the poverty of the plaintiff during the time of the running of the note. We think this evidence was improperly excluded. The case is one in which the greatest liberality consistent with the rules of evidence should have been indulged in the proof of circumstances relevant to the question of payment. The demand is stale. The

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claim is to recover upon a note more than twenty-one years past due, brought after the death of the only party by whom (as may be supposed) the defendant would have been able to show payment, if the note had in fact been paid, and who for a period of seventeen years after the note became due, was within the jurisdiction of the court, but against whom no proceedings were taken. The presumption of payment from a great lapse of time is founded upon the rational ground that a person naturally desires to possess and enjoy his own, and that an unexplained neglect to enforce an alleged right, for a long period, casts suspicion upon the existence of the right itself. This presumption may be fortified or rebutted by circumstances. The fact that a plaintiff during the period when he might have enforced his demand by suit, if he had one, was in indigent circumstances and needed the use of his means, is we think, a circumstance tending to fortify the presumption that the demand has been paid or otherwise satisfied (See Wharton on Ev., § 1363; *Ross v. Darby*, 4 Munf. 428; *Miller v. Smith's Exrs.*, 16 Wend. 425; *Waddell v. Elmendorf*, 10 N. Y. 170). In this case it is said that there are circumstances rebutting any presumption of payment. But we are dealing with exceptions to the rejection of proof offered on the part of the defendant, which was relevant to the issue, and which should have been admitted and considered in connection with other circumstances in determining the issue of payment. The fact that evidence explaining the delay of the plaintiff was rejected upon the objection of the defendant, does not cure the error complained of. The defendant's evidence to fortify the presumption of payment having been rejected, his exception was not waived by objecting to evidence of circumstances to rebut the presumption, subsequently offered on the other side.

We think the judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

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PASCAL P. PRATT et al., Respondents, v. WILLIAM A. STEVENS et al., Appellants.

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The provision of the act in relation to assignments for the benefit of creditors (Subd. 3, § 3, chap. 466, Laws of 1877), requiring that the inventory of a debtor making an assignment shall state the sum owing to each creditor "with the true cause and consideration therefor" does not require, where the indebtedness consists of promissory notes, that the inventory should state what they were given for. A statement, as to each note, of its date, time of payment, payee, to whom belonging, and the amount due thereon is sufficient.

Where an assignor has knowledge that a security which has been given by him to a creditor, for instance a chattel mortgage, is fraudulent and void as to creditors, he is not bound to state the same in his inventory by the provision of said statute (Subd. 3, § 3), requiring the inventory to contain "a full statement of any existing security for the payment" of a debt owing by the assignor; the provision applies simply to valid securities.

Where an affidavit of the assignor to the inventory, after stating as required by the statute (Subd. 5, § 3, *supra*, as amended by § 1, chap. 318, Laws of 1878), that the same was "in all respects just and true," added "to deponent's best knowledge, information and belief," held, that there was a substantial compliance with the statute; that it was not essential that the matter sworn to should be wholly within the actual knowledge of the debtor; and that the added words did not modify or detract from those preceding them.

When the county judge is absent from the county a delivery of the inventory to his clerk, at the office of the county judge, is a substantial compliance with the provision of said act (§ 3), requiring such inventory to be delivered to the county judge of the county where the assignment is recorded.

So, also, a delivery of the inventory to the county judge of an adjoining county, who at the time is holding court in the county, is sufficient, as under the act of 1877 (Chap. 11, Laws of 1877) such county judge is clothed with all of the powers, and may perform all of the duties of the county judge of the county.

As to whether the provision of said General Assignment Act (§ 3, subd. 5), declaring that, in case of failure to file an inventory as prescribed, the assignment will be void, was to be considered as a penalty; and as to whether the amendatory provision of the act of 1878 (Chap. 318, Laws of 1878), declaring that the failure to file the inventory as required shall not invalidate the assignment, and conferring upon the county judge the power to order an inventory to be amended or corrected, is to be

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considered as a repeal of the penalty, and so as taking away all right to have an assignment executed before the passage of the amendatory act declared void because of failure to file the inventory, *quære*.

Pratt v. Stevens (26 Hun, 229), reversed.

(Argued December 10, 1883; decided January 15, 1884.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made December 30, 1881, which reversed a judgment in favor of defendants, entered upon the report of a referee. (Reported below, 26 Hun, 229.)

The nature of the action and the material facts are stated in the opinion.

Samuel Hand for appellants. The penalty fixed by the statute does not attach if an inventory is made and filed within thirty days by the debtor. (Laws 1877, chap. 466, § 3; 1 Abb. N. C. 43, 44.) The delivery of the inventory to the clerk of the county judge and the filing by him was a sufficient compliance with the statute. (Laws 1878, chap. 11.) The act of 1878 (Chap. 11) is not unconstitutional. (Const., art. 6, §§ 15, 16.) The penalty imposed by the act of 1877 has been repealed by the act of 1878. (Laws 1878, chap. 318; *Hoppeck v. Stone*, 49 Barb. 524; *Butler v. Palmer*, 1 Hill, 324; *Curtis v. Leavitt*, 15 N. Y. 9, 152, 153; *People v. Livingston*, 6 Wend. 526, 530.)

John G. Milburn for respondents. The affidavit of verification is defective in that it is not sworn to positively. (*Lambert v. People*, 76 N. Y. 220.) None of the requirements of the statute, as to the contents or verification of the inventory, can be taken as merely directory or immaterial. (*Merritt v. Village of Port Chester*, 71 N. Y. 309; *Thompson v. White*, 4 S. & R. 135; *Hardman v. Bowen*, 39 N. Y. 196; *Julian v. Rathbone*, id. 369; *In re Leahy*, 8 Daly, 124; *Produce B'k v. Morton*, 67 N. Y. 199.) The judge of Genesee county could not constitutionally perform any duties of the judge of Livingston county, except preside at courts there. (Const., art. 6, § 15; id., art. 10, § 2.)

MILLER, J. This action was in the nature of a creditor's bill to set aside a general assignment, made January 12, 1878, by the defendants Stevens and Shepard, to Kidder M. Scott, also a defendant, for the benefit of creditors. The principal ground urged against the validity of the assignment is, that no inventory was made or filed in accordance with the provisions of the statute regulating general assignments (Chap. 466, Laws of 1877). Section 3, subdivision 5, of the statute in question, declares that in case an inventory is not made and filed within thirty days, by the debtor or the assignee, the assignment is void. It is claimed that the inventory, made and filed by the assignors, did not comply with the provisions of the statute in several particulars, and for these reasons the assignment was rendered invalid and void. The first objection insisted upon is that the inventory failed to state the true cause and consideration of the debts owing by the assignors, as required by the third subdivision of the third section of the act cited. The inventory contains a statement of several promissory notes of the assignors, with their dates, time of payment, to whom payable and to whom belonging, and the amount due on the same. This statement shows an indebtedness of the assignors to the amount stated, which is evidenced by the notes given. These notes of themselves imply a cause and consideration for the indebtedness, and it would not seem to be necessary to state in the inventory what they were given for. The object of the provision evidently was to give information to the creditors in reference to the indebtedness of the assignors, and this would appear to be answered by a statement that they owed certain notes which were specifically described. Whether these notes were given for moneys loaned, or any other purpose, is not material in order to show a consideration, as the notes themselves, on their face, import and show that fact and the cause of the indebtedness. It follows, therefore, that the objection we have considered is not well founded.

It is further objected that no mention was made in the inventory of certain chattel mortgages, executed by the assignors, to Franklin Stevens and Cornelius Shepard, which were given to

secure certain debts set forth in the inventory ; and also that the inventory was defective in not stating the existing securities for the payment of said debts, as required by the third subdivision of the third section of the statute, and it is insisted that this omission was intentional. It appears that the mortgagees took the mortgages from the files and surrendered them to the assignees, stating that they would make no claim under them. The mortgages were clearly void as against creditors, and the presumption is that this was known to the debtors. Such being the case it cannot be said that they constituted a valid security for the payment of a debt owing by the assignors, or that they were an incumbrance upon the property inventoried, and it was, therefore, unnecessary to state the same. Nor, can it be claimed, under these circumstances, that the omission to mention the chattel mortgages was intentional. Fraud is never presumed, but must be established by competent evidence ; and where an assignor has knowledge that securities which have been given are, in law, fraudulent and void, he is not bound to state the same in the inventory. It is no answer to this view to say that it is sufficient that they were good between the parties, for if they were otherwise fraudulent and void, they were not such valid securities as the statute required should be stated. The delay of the mortgagees in making a disclaimer of any intention to insist upon the validity of the mortgages does not affect the act of the assignors in omitting the same from the inventory, if, in fact and in law, they were fraudulent and void as against creditors, for in that contingency they were of no avail whatever. And it cannot be claimed that by the omission the assignors did not furnish in the inventory the actual state of affairs in this respect as they existed at the time of the assignment. It may also be remarked that there was no finding of the referee, or request to find, that the omission was intentional. And it is by no means clear that the point urged is presented by the record upon this appeal.

It is also insisted that the affidavit of verification is defective, in that it is not sworn to positively, but merely to the best

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of their the assignors) knowledge, information and belief. The statute (Subd. 5, § 3) requires that the inventory shall be verified by an affidavit, made by the debtor, that the same is in all respects just and true; and that in case the debtor shall not make and file the inventory within twenty days, the assignee shall make and file the same within thirty days, and that the assignee shall verify the inventory, so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief. It will be seen that there is a distinction between the two affidavits. The affidavit here follows the statute, and then adds the words "to deponent's best knowledge, information and belief." We think that the addition made was not in contravention of the statute, and that the language employed was a substantial compliance with the same. The statute prescribes no particular form and it is not required that the affidavit shall be absolute and unqualified. The statute does not provide, nor is it essential that the matter sworn to should be within the actual and positive knowledge of the debtor, nor does it forbid the debtor from making a qualification as to his knowledge in reference to the matters required to be given in the inventory. It might well be in many cases that the debtor could not swear positively from his own knowledge and would have to rely upon the information which he had received in regard to the property to be included in the inventory. In such cases the debtor might be precluded from making the affidavit if the construction insisted upon is the correct one. This could not have been intended by the statute, as the effect would be to deprive the creditors of the benefit of the affidavit of the debtor, who it is to be presumed has more knowledge and information on the subject than any other person. If the construction insisted upon is correct the want of knowledge of a single fact would prevent the debtor from making the affidavit. The fact that the law makes a distinction between the affidavit to be made by the debtor and the affidavit to be made by the assignee, of itself does not imply that the affidavit of the former is to be absolute and unqualified, while that of the latter is restricted, provided the

secure certain debts set forth in the inventory ; and also that the inventory was defective in not stating the existing securities for the payment of said debts, as required by the third subdivision of the third section of the statute, and it is insisted that this omission was intentional. It appears that the mortgagees took the mortgages from the files and surrendered them to the assignees, stating that they would make no claim under them. The mortgages were clearly void as against creditors, and the presumption is that this was known to the debtors. Such being the case it cannot be said that they constituted a valid security for the payment of a debt owing by the assignors, or that they were an incumbrance upon the property inventoried, and it was, therefore, unnecessary to state the same. Nor, can it be claimed, under these circumstances, that the omission to mention the chattel mortgages was intentional. Fraud is never presumed, but must be established by competent evidence ; and where an assignor has knowledge that securities which have been given are, in law, fraudulent and void, he is not bound to state the same in the inventory. It is no answer to this view to say that it is sufficient that they were good between the parties, for if they were otherwise fraudulent and void, they were not such valid securities as the statute required should be stated. The delay of the mortgagees in making a disclaimer of any intention to insist upon the validity of the mortgages does not affect the act of the assignors in omitting the same from the inventory, if, in fact and in law, they were fraudulent and void as against creditors, for in that contingency they were of no avail whatever. And it cannot be claimed that by the omission the assignors did not furnish in the inventory the actual state of affairs in this respect as they existed at the time of the assignment. It may also be remarked that there was no finding of the referee, or request to find, that the omission was intentional. And it is by no means clear that the point urged is presented by the record upon this appeal.

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former can be construed as including information and belief. We think it can be so interpreted within well-settled rules. The affidavit of the debtor, in this case, on its face is to the effect that the inventory is in all respects just and true. The addition of the words, "to deponent's best knowledge, information and belief," does not modify or detract from the words previously employed. The general rule is that an oath taken before a competent officer merely verifies the truth of the facts stated, according to the best knowledge, information and belief of the affiant. The positive affirmation of the fact sworn to in an affidavit is in most cases supposed and understood to be according to the best knowledge, information and belief of the witness. In the case at bar, this would be so if the statement made was unqualified. It is not any the less so because it is qualified. The statute requires that the values must be given by the debtor according to his best knowledge, and as such values may depend upon information and belief, it is difficult to see how they can be given as absolutely true. The affidavit here is as absolute in fact and in law as if the additions made had not been inserted. We do not think that it was the intention of the law makers to provide for an affidavit only as to facts which are within the knowledge of the debtor, and to preclude entirely such information as he may have derived from others. The statute merely requires such an affidavit as would usually be made by persons who had general knowledge of the transaction in regard to which they swear, and not an absolute and unqualified assertion of positive knowledge. If the affidavit made was false and untrue, and upon a trial for perjury it was proved that the debtors had neither knowledge, information nor belief, there is no good reason why a conviction could not be had for the offense charged. Giving to the statute a reasonable construction we think the affidavit was substantially in conformity with its provisions.

There is no force in the objection that the inventory was not properly filed with the county judge. He being absent at the time from the county on account of his health, the delivery of the inventory to his clerk was a constructive delivery to him. The statute does not provide for a personal delivery, and

it is sufficient that the inventory came into his possession. The filing is not required to be in the handwriting of the judge, but may be done, we think, by his directions, in his absence or in his presence. It is a clerical and not a judicial act, and the object is answered by a filing of the inventory by his clerk at the office of the county judge, at the county seat where special terms are held, and where the judge has a clerk to file and take charge of such papers. The statute is fully answered by such a delivery and filing. Were it otherwise the object of the statute might be defeated by the absence of the county judge from the county. This never could have been intended. The inventory here, within the thirty days required by the act, was delivered to the county judge of the adjoining county, who was at the time holding court in, and authorized to exercise all the powers, and perform all the duties of the county judge of Livingston county, which said last-mentioned judge was by law authorized to exercise and perform at the court or in vacation. (Chap. 11, Laws of 1877.) The statute was thus fully complied with and the same was not unconstitutional. The provision of the law which rendered the assignment void, if the inventory was not filed as required, has been repealed by chapter 318, Laws of 1878, which provides that a failure to file the inventory shall not invalidate the assignment; and it confers upon the county judge the power to order any inventory filed to be corrected or amended.

The appellants' counsel insists that the act of 1878 repealed the penalty imposed by the act of 1877, and that all right of action on the part of the plaintiffs to enforce the penalty is lost. Inasmuch as no valid reason is presented for setting aside the assignment upon the ground that the inventory was not filed as required by law, we do not deem it necessary to consider this question.

For the reasons stated the order of the General Term should be reversed, and the judgment upon the referee's report, affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

Statement of case.

JOHN B. CORNELL et al., Appellants, v. ASHBEL H. BARNEY et al., Respondents.

To give a lien upon a building under the mechanic's lien law for the city of New York, of 1875 (§ 1, chap. 379, Laws of 1875), the work must have been done or materials furnished at the instance of the owner of the building or improvement, or of his agent.

To give a lien upon the land on which the building stands the building must have been constructed for and at the expense of the owner, or under contract with him. (§ 3.)

Materials were furnished by plaintiffs, under a contract with a lessee, for a building in process of construction by the latter, in pursuance of provisions in his lease, by which he covenanted to erect a building on the demised premises of at least a specified value. The lessor covenanted to loan a specified sum as the building advanced, to be secured by mortgage on the lessee's interest. The building, at the end of the last of certain renewals provided for, or sooner in case the lessee failed to perform his covenants, was to revert to and become the property of the lessor. In an action to foreclose an alleged mechanic's lien, *held*, in the absence of evidence that the lessor had some connection with plaintiff's contract, plaintiff was not entitled to have or enforce a lien against the interest of the lessor in the land or building, but only against that of the lessee.

Burkitt v. Harper (79 N. Y. 278), *Otis v. Dodd* (90 id. 836), distinguished.

(Argued December 10, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made December 23, 1881, which affirmed a judgment in favor of defendant Barney, entered upon a decision of the court on trial at Special Term. (Reported below, 26 Hun, 134.)

This was an action to foreclose an alleged mechanic's lien.

The material facts are stated in the opinion.

Lemuel Skidmore for appellants. By chapter 379 of the Laws of 1875, the legislature intended to enlarge the remedy afforded by the former acts on the same subject. (*Heckman v. Pinkney*, 81 N. Y. 216; *Hackett v. Badeau*, 63 id. 478; *Loonie v. Hogan*, 9 id. 440; *Knapp v. Brown*, 45 id. 207; *Stuyvesant v. Browning*, 1 J. & S. 204; 54 N. Y. 363; *Mul-*

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doon v. Pitt, 4 Daly, 104; 54 N. Y. 269.) In order to confirm this view of the legislative intention, and to ascertain its compass, it is allowable to refer to contemporaneous legislation, although not precisely *in pari materia*. (*Chase v. Lord*, 6 Abb. N. C. 276.) The legislature intended altogether to discard the requirements of "a contract, express or implied," on the part of the owner of the land, and to enlarge the remedy of the workman or furnisher of materials in the direction of all cases where the owner of the land should consent to the work, or at all events instigate, or in any way procure it to be done on his land. (*Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 24 Hun, 538; *Loonie v. Hogan*, 9 N. Y. 435; *Riley v. Watson*, 3 Hun, 570; *Reno v. Pindar*, 20 N. Y. 301; *Pierson v. People*, 18 Hun, 248; *Eckhard v. Donohue*, 9 Daly, 214; Laws of 1863, chap. 500, § 5.) Salem, the lessee, was the agent of Mr. Barney, under the true meaning of section 1 of act of 1875. (*Moore v. Jackson*, 49 Cal. 109.) The condition imposed by the latter part of section 1 of act of 1875 was intended simply to limit the land-owner's liability to the amount which he should be liable to pay after deducting such payments as he had made before the lien was filed. (*Heckman v. Pinkney*, 81 N. Y. 216; *Doughty v. Devlin*, 1 E. D. Smith, 644; Story's Eq. Jur., §§ 799-1234.) Before Mr. Barney could claim that Salem had forfeited his contract, he should show that by some act or notice he put Salem distinctly in default. (*Schuyler v. Hayward*, 67 N. Y. 254; *Wheeler v. Scofield*, *id.* 314.) Neither could Mr. Barney claim that the lease to Salem was terminated by forfeiture for breach of covenant to erect the building, unless he proved entry or ejectment by himself for such forfeiture, since there was a provision for re-entry. (*Garner v. Hannah*, 6 Duer, 262; *Parmelee v. O. & S. R. R.*, 6 N. Y. 80; *Conger v. Duryee*, 12 Abb. N. C. 43; *Giles v. Austin*, 62 N. Y. 486.) The general clause in the lease from Mr. Barney to Mr. Salem providing for a forfeiture of the lessee's interest upon breach of any covenant was not in the nature of a limitation, but the estate of the lessee was terminable only upon the election of the lessor, and

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as long as he omitted to so elect it continued in the lessee. (*Horton v. N. Y. C. R. R.*, 12 Abb. N. C. 31; *Olough v. L., etc., R. R.*, 1 Moak's Eng. R. 157, 158.) The Recording Act has no application to this case. (*Dunlop v. Avery*, 89 N. Y. 598.) If the court hold that Salem was "owner of the building" at the time of filing, plaintiff's lien attached to all the interest which Salem "then had" in the building, and could not be divested by any subsequent act or default of Salem or of Mr. Barney. (*London & Westminster Co. v. Drake*, 6 C. B. [N. S.] 798.) If Salem possessed the right to remove the building there is no doubt the lienors would have the same right. (*Ombony v. Jones*, 19 N. Y. 234; *Haven v. Emery*, 33 N. H. 68; *Hunt v. Bay State Iron Co.*, 97 Mass. 282.) The default was an admission of the facts pleaded by plaintiffs. (*Bullard v. Sherwood*, 85 N. Y. 256.)

Edward Patterson for respondents. Mr. Barney's estate in the land was not subject to a lien for the plaintiffs' materials, nor was he liable to them for the value of such materials under the act of 1875. (*Burbridge v. Marcy*, 54 How. Pr. 446; *Heckman v. Pinkney*, 81 N. Y. 211; *Dugan v. Brophy*, 55 How. Pr. 121; *Knapp v. Brown*, 45 N. Y. 207; *Stuyvesant v. Browning*, 1 J. & S. 203; *Muldoon v. Pitt*, 54 N. Y. 272; *Burkett v. Harper*, 14 Hun, 584.) Even if Salem is to be regarded technically as a contractor with Barney, to erect a brewery on his land, and the plaintiffs as sub-contractors, they have failed to establish their right to a lien. They were bound to show that Salem had made full performance of his contract with Barney. (*Randolph v. Garvey*, 10 Abb. 179; *Broderick v. Poillon*, 2 E. D. Smith, 554; *Quinn v. Mayor*, id. 558; *Rudd v. Davis*, 3 Hill, 287; *Smith v. Cole*, 2 Hilt. 365.) It was incumbent upon the plaintiffs to show also that there was something due from Barney to Salem under a contract. (*Smith v. Cole*, 2 Hilt. 365; *Broderick v. Poillon*, 2 E. D. Smith, 554; *Ferguson v. Buck*, 4 id. 721; *Bailey v. Johnson*, 1 Daly, 61.) No lien was created by the filing of the notice of claim, and hence there is no foundation for this ac-

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tion. (*Mushlitt v. Silverman*, 50 N. Y. 360; *Benton v. Wicknese*, 54 id. 226; *Dowdney v. McCullum*, 59 id. 372; *Corkright v. Thompson*, 1 E. D. Smith, 661; *Grant v. Vandercooke*, 57 Barb. 165; *Meyer v. Beach*, 79 N. Y. 409; *Borroughs v. Tostevan*, 75 id. 567.)

EARL, J. In June, 1877, the respondent Barney entered into an agreement with the defendant Salem, whereby he leased to Salem a lot of land, situate in the city of New York, to hold from that date for fifteen years from the first day of January thereafter, for the yearly rent, payable quarterly, of \$4,100, besides taxes and assessments, and Salem agreed before the first day of January to erect upon the lot a building which was to cost and to be fully worth the sum of \$50,000. Barney agreed to loan and advance to Salem from time to time during the progress of the building, the sum of \$25,000, no part of which, however, was to be advanced, except on the presentation by Salem, if required, of evidence that he had expended an equal sum upon the building. When the sum of \$25,000 had thus been fully loaned, Salem was to execute a mortgage upon his interest in the building to Barney to secure the payment thereof in annual payments. In case Salem erected the building and kept all his covenants, Barney agreed that at the expiration of the term he should have another lease for a further term of fifteen years, at a rent to be agreed upon, and in case they could not agree, then at a rent to be fixed by arbitrators, not less than \$4,100 per annum — the rent to be fixed for the lot exclusive of the buildings and improvements thereon; and provision was made for five more similar renewals for rent to be agreed upon or fixed in the same way. During the continuance of the lease Salem was to keep an insurance against loss by fire upon the buildings upon the lot for the sum of \$50,000, and in case of loss the amount of the insurance money received was to be used in repairing, or rebuilding the buildings. In case Salem failed to renew the lease at the end of any term, or in case he failed to keep the covenants, and also at the end of the final term, the lot with all the buildings

thereon was to revert to and become the absolute property of Barney, his heirs or assigns.

Under this agreement, which was recorded in the proper office in the city of New York, on the 19th day of September, Salem took possession of the lot, and commenced to erect a building thereon. On the 22d day of October he entered into a contract with the plaintiffs to furnish the iron to be used in the building, for which they were to be paid by him the sum of \$8,000. In performance of their contract they furnished iron, for which they were entitled to be paid \$5,500, and for which they were paid only the sum of \$1,500, the first installment. To secure the balance, on the 13th day of December they filed a lien upon the lot and building in the clerk's office of the city and county of New York, and this action was subsequently commenced to enforce such lien.

We are of opinion that the court below properly decided that the plaintiffs were not entitled to have or enforce any lien against the interest of Barney in the lot or building thereon, for the reason that the iron was not furnished under any contract with him, or at his instance, and that he did not cause the building to be constructed.

Section 1 of the Lien Act, applicable to the city of New York (Chap. 379 of the Laws of 1875), provides that "every person performing labor upon, or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien on the same for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent." To give a lien under this section, the work must have been done or materials furnished at the instance of the owner of the building or the improvement, or at the instance of his agent, and the lien is upon the building or other improvement. Such is the plain language, and there is no room for construction. Here the iron was not furnished at the instance of Barney. His contract with Salem did not even require any iron to be used in the erection of the building, and it does not appear that he had any thing whatever to

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do with Salem's contract with the plaintiffs, or with the procurement of the iron from them, or that he knew any thing about it. It is true that Salem covenanted with Barney to erect the building, and that Barney agreed to advance money to be applied toward the erection of the same, and that he was to have a mortgage on the same; yet the building was not erected for Barney, and was not, before the termination of the lease, to belong to him, and in no proper sense could the material furnished for the same be said to be furnished at his instance. In harmony with this view is section 2 of the act which provides that "any person, who at the request of the owner of any lot, etc., grades, fills in, or otherwise improves the same, or the sidewalk or street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished." Here the word "request" is used in substantially the same sense as the word "instance" in the prior section, and was intended to have the same scope.

Section 1 having provided for a lien upon the building, section 3 provides for a lien upon the lot upon which the building stands, as follows: "The land upon which any building, etc., is constructed, etc., shall be subject to the liens if at the time the work was commenced or materials for the same had commenced to be furnished, the land belonged to the person who caused said building, etc., to be constructed, etc.; but, if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien." The plaintiffs can have no lien under this section upon Barney's interest in the land, because he did not in any proper sense cause the building to be constructed. Within the meaning of this section the building must be constructed for and at the expense of the owner of the land or under contract with him. Salem caused this building to be constructed, and the plaintiffs could have a lien upon his interest in the land under his lease.

In construing the portion of this act now under consideration we are not much aided by a reference to other lien acts. The language giving the lien in this act has not the same scope as that contained in the act chapter 478 of the Laws of 1862, in

which a lien is given where a building is erected upon land by the permission of the owner, or as that contained in the act chapter 489 of the Laws of 1873, in which a lien is given where a building is erected upon land with the consent of the owner, which acts came under our consideration in the cases of *Burkitt v. Harper* (79 N. Y. 273), and *Otis v. Dodd* (90 id. 336). The widely different language used in this act enacted subsequently to those acts must be held to indicate a different legislative purpose.

The act chapter 500 of the Laws of 1863 provided that "any person who shall as contractor, laborer, workman, merchant or trader, in pursuance of or in conformity with the terms of any contract or employment by the owner, or by or in accordance with the directions of the owner or his agent, perform any labor or furnish any material toward the erection, etc., of any building, shall have a lien" upon the house and the lot upon which it stands. The words "with the direction of the owner or his agent" in that act must certainly have as broad scope as the word "instance" in this act, and they were held to give a lien only in case there was a contract, express or implied, with the owner of the land, for doing the work or furnishing the materials. (*Knapp v. Brown*, 45 N. Y. 207; *Muldoon v. Pitt*, 54 id. 269.) In *Heckmann v. Pinkney* (81 id. 216), we held, considering all the provisions of the act of 1875, that a subcontractor with one who had contracted with the owner could have a lien upon the interest of the owner in the lot or building for any amount which the owner was liable to pay; but the opinion in that case does not give any countenance to the claim that the interest of the owner can be subjected to a lien, except when he has contracted for the building or improvement for which the work and materials are furnished, or except they have been furnished at his instance or request.

It must at least be said that the construction of this act, so far as the same is now involved, is not free from doubt, and, therefore, the construction given to it by the courts in the locality where the act alone operates, which are constantly dealing with the act in view of all the circumstances and difficulties

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bearing upon its execution, should have great weight with us, and so far as we can ascertain, it has been uniformly construed there in accordance with the views above expressed. (*Brown v. Zeiss*, 9 Daly, 240; *Burbridge v. Marcy*, 54 How. Pr. 446; *Dugan v. Brophy*, 55 id. 121; opinion of DANIELS, J., in this case.)

It is better to leave any amelioration or improvement of the law which may be needed to the legislature, than by a forced and unnatural construction of the language used in this act to seek for a legislative purpose not apparently expressed.

Salem suffered default, and hence the plaintiffs claim that they should at least have had judgment against him. The claim is well founded. At the time they noticed this cause for trial they also noticed a motion for judgment against Salem for the relief demanded in their complaint. There is nothing showing that that motion was brought on, and there is no exception which brings before us for review any error as to the claim of the plaintiffs against Salem. They are entitled to relief against him, and they may yet apply for that. Nothing has yet transpired in this action to bar them of such relief; and that there may be no mistake about it, the judgment in this action, and the affirmance thereof must be without any prejudice to such relief as the plaintiffs may, upon Salem's default, be entitled to have in this action against him, and the judgment should be so affirmed, with costs.

All concur.

Judgment accordingly.

IRVING G. VANN et al., as Executors, etc., Appellants, v.
SIMEON ROUSE et al., Respondents.

Under the act of 1860 (Chap. 345, Laws of 1860) releasing the lessee of a building from liability for rent after injury to the building, without his fault or neglect, rendering it untenable, "unless otherwise expressly provided by written agreement," to deprive a tenant of the benefit of the

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statute, there must be an express written agreement on his part indicative of an intent to waive such benefit.

A lease contained a provision "that in case the tenant shall abandon the premises at any time, the rent then due or to become due" shall be due and collectible. *Held*, that this was not such an agreement.

In an action upon a guaranty of payment of rent, reserved by a lease of certain rooms in a building, defendants set up, by way of counter-claim, and proved damages to the furniture and fixtures of the lessee by reason of a flow of water from other parts of the building under the control of the lessor, because of defective water pipes, which he, after notice, omitted to keep in order, and an assignment of such damages to defendants." No question was raised upon the pleadings, and no objection was made upon the trial that the liability of the landlord was not the proper subject of a counter-claim. *Held*, that it could not be raised upon appeal.

(Argued December 10, 1888; decided January 15, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of defendants, entered upon an order made January 21, 1882, which denied a motion for a new trial and directed judgment upon a verdict.

This action was brought upon a guaranty of payment of rent reserved by a lease, the substance of which, as well as the material facts, are stated in the opinion.

M. M. Waters for appellants. The court clearly erred in holding that the defendants were, without assignment, entitled to set off the damages sustained by the society by reason of the injury to the furniture, carpets, etc., for the reason that the society was insolvent. (*Gillespie v. Terrence*, 25 N. Y. 306; *Lasher v. Williamson*, 55 id. 619; *Smith v. Felton*, 43 id. 419; *O'Blenis v. Karing*, 57 id. 649.) This damage to property outside the leased property, if a cause of action at all, was solely one in tort, and therefore not a set-off, counter-claim, or recoupment, even in favor of the society, much less in favor of defendants in this action. (*Edgerton v. Paige*, 20 N. Y. 281; *Boreel v. Lawton*, 90 id. 293.) The court erred in holding as matter of law that if the premises were untenable and unfit for occupancy on the 24th of December, 1874, without fault of the tenants, then they were justified in leaving, and were not

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liable for more than \$75 and interest. (*Orogin et al. v. N. Y. C. R. R. Co.*, 51 N. Y. 61; *Butler v. Kidder*, 87 id. 99.) The court erred in holding that the landlord was liable for the damages arising from the negligence of other tenants in the building, if he was notified of the defect, or if the defect came to his knowledge and he failed within a reasonable time to use all reasonable care and diligence in repairing that defect. (*Robbins v. Mount*, 4 Robt. 553; *Witty v. Mathews*, 52 N. Y. 512.) The defect was not one which came within the meaning of the statute of 1860 (Chap. 345). (*Suydam v. Jackson*, 54 N. Y. 450; *Locknow v. Hergan*, 58 id. 685.) The court erred in refusing to charge that the lessees had the right to repair the part of the water pipe which passed through the hall over the part of the building occupied by them. (*Lampson v. Milks*, 21 N. Y. 508; *Coddington v. Dunham*, 35 N. Y. Sup. Ct. 442.)

William G. Tracy for respondents. The statute of 1860 applies to every case where the demised premises become untenable and unfit for occupancy from any cause other than the want of such ordinary repairs to the demised premises as the tenant is bound to make. (*Fash v. Kavanagh*, 24 How. 347; Laws of 1860, chap. 345; *West Side S'v'gs B'k v. Newton*, 57 How. 152; 76 N. Y. 616.) The negligence on the part of the lessor, by which the demised premises became untenable, after his promise to repair, repeatedly made and broken, amounted to an eviction, and justified the lessees in surrendering possession without reference to the statute of 1860. (*Alger v. Kennedy*, 49 Vt. 109; *Jackson v. Eddy*, 12 Mo. 209; *Roger v. Ostrom*, 35 Barb. 523; *Toole v. Beckett*, 67 Me. 544; *Sequard v. Corse*, 9 W. D. 51; *Dyett v. Pendleton*, 8 Cow. 727, 731, 735; Wood's Landlord and Tenant, § 384; *Collins v. Barrow*, 1 M. & R. 112; *Cowie v. Goodwin*, 9 C. & P. 378.) A party who deprives another of the consideration upon which his obligation is founded cannot, in general, recover for a violation of that obligation. (*Dyett v. Pendleton*, 8 Cow. 731, 735.) The lessees, defendant's assignors, could recover from the plaintiff, its lessor, all damages sustained by such lessee

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from the neglect and failure of the plaintiff to stop the leakage of water into the premises after notification thereof. (*Rogers v. Ostrom*, 35 Barb. 523; *Stapenhorst v. Am. Manuf. Co.*, 46 How. Pr. 510; *Toole v. Beckett*, 67 Me. 544.) It was not necessary that the acts complained of should amount to an eviction. (*Lucky v. Frantzke*, 1 E. D. Smith, 47; *Morgan v. Smith*, 5 Hun, 220; *Cooke v. Soule*, 56 N. Y. 420; *Myers v. Barns*, 35 id. 269.) The sureties of an insolvent lessee in an action for rent may avail themselves of any counter-claim existing in favor of their principal to an extent sufficient to defeat a recovery without proof of an assignment or transfer of such counter-claim to them. (*Morgan v. Smith*, 7 Hun, 244.) A covenant for quiet enjoyment of the premises during the term is implied on the part of the lessor in every lease for three years. (*Mayor v. Mabie*, 3 Kern. 152; *Boreel v. Lawton*, 90 N. Y. 293.) The failure of the landlord to perform the agreement to repair gave the tenant a cause of action on contract, and is a proper counter-claim in this action. (*Cooke v. Soule*, 56 N. Y. 420; 1 N. Y. Sup. Ct. 116; *Gleadell v. Thompson*, 56 N. Y. 194, 200.) As the damages were sustained from the failure to repair certain parts of the building in the possession and under the control of the plaintiff, the charge that he is liable was proper. (*Priest v. Nichols*, 116 Mass. 401.) The tenant would have been a trespasser if he had interfered with the water pipes of the landlord. (*West Side S'v'gs B'k v. Newton*, 57 How. 152; *Coddington v. Dunham*, 35 N. Y. Sup. Ct. 442.)

DANFORTH, J. On the 22d of April, 1873, the plaintiff leased to the Second Universalist Society, of Syracuse, three rooms in the second story of No. 61 South Salina street, Syracuse, to be occupied by them "as a place for religious worship, and purposes connected therewith, for the term of three years, commencing on the 1st day of May, 1873, and ending on the 30th day of April, 1876, at the annual rent of \$400 the first year, and \$500 the next two years; in equal monthly payments—subject, however, to the provision that in case the

tenant shall abandon the premises at any time, the rent then due or to become due, on this lease, "shall be in reality due and collectible."

This agreement was upon conditions, all of which the tenant undertook to perform, and among others, to pay the rent at the times above specified. The defendants guaranteed the payment of the rent as it became due. It was paid by the tenants up to November 1, 1874, but soon after they abandoned the premises, because, as they alleged by reason of a flow of water from other parts of the building, owned by the lessor and under his control, they became untenable and not fit for the purposes for which they were hired. There was evidence to warrant this assertion and to show also that the fixtures and furniture of the society were injured by the water and the plaster which it brought down, and that the tenants suffered damage thereby in other respects.

This action was brought upon the guaranty to recover rent accruing by the terms of the lease after the tenants vacated the premises. The defendants, to defeat the action, relied upon the facts above stated, and set up by way of counter-claim those damages which the tenants had sustained. It was assumed by both parties that there was evidence from which the jury might find the defendants to be assignees of the tenant in respect to them, but the contention of the plaintiff was that the assignment was not made until after the commencement of the action, and so not available to the defendants. It does not appear that upon the trial any question was raised on the pleadings, and the written argument of the appellants leads to the inquiry, whether in view of the evidence the court erred in giving instructions to the jury:

First: "That if without fault or negligence on the part of the tenants, the rooms were untenable and unfit for occupancy, they were justified in leaving and would not be bound thereafter to pay rent."

At common law the rule was otherwise. The lessee was held by the obligation of his express covenant to pay rent, although the premises had been actually destroyed. But the rights of

the parties were regulated by statute (Session Laws of 1860, chap. 345), and the charge of the judge followed its language. The immunity afforded by it is absolute, "unless otherwise expressly provided by written agreement or covenant" (statute, *supra*). And the learned counsel for the appellants argues that the stipulation in the lease, which makes the whole rent at once due and collectible in case the tenant abandons the premises, is such an agreement. We cannot, however, find in the words referred to any evidence of an intention on the part of the lessees to waive the advantage which the written law gives them. The statute declares that under certain conditions a tenant shall not be bound to pay rent after injury to the premises, and there are no words in the lease referring to such event or providing that the tenants will pay, notwithstanding its occurrence. Here is no new or additional promise to pay rent, but merely a stipulation waiving the prescribed period of credit which the tenant would otherwise have.

When the legislature casts a charge or duty upon the owner of premises, there must be something more than this to shift the burden from him to the tenant. The law put upon the landlord the risk of having premises unfit for occupation, and here before the condition of the lease attached, upon which payment was expedited, the statute intervened and released the tenant from his obligation to pay, after the day of the injury, so that at the time of abandonment liability to pay rent had ceased. It could not accrue "after the premises became untenable and unfit for occupancy," and there was nothing therefore to which a stipulation could apply. The statute is not within the covenant, and there are no words from which it can be inferred that the parties had the law in their minds. There is certainly no agreement that the tenant shall continue liable, notwithstanding its provisions, and they cannot be made so without an express covenant. The plaintiffs' contention would, if successful, operate, so far as the tenants are concerned, as a repeal of the statute and subject them to the rigor of the common law. This claim is not sustainable.

"*Second*: We are referred to no evidence which would

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warrant a finding that the assignment of the claim for damages was made after the commencement of the action. The written transfer was lost, but its execution was not controverted, and the circumstances attending it, as well as the testimony of witnesses, permit no other inference than that its delivery was before suit actually brought. It was sufficient to defeat a recovery for rent otherwise due, and if the facts found established injury, for which the plaintiff was responsible, furnished cause for an affirmative judgment against the landlord. Indeed the case was tried upon this theory, and at the plaintiff's request the court charged that the defendants could not recoup for damages unless they resulted from the positive acts or negligence of the plaintiff or his agent. There was evidence of these things, and the verdict established that the tenants were justified in abandoning the premises, and that they did sustain damages by reason of the plaintiff's omission to keep in order water pipes and closets in rooms under his control, after notice that they were defective and causing injury to the plaintiff. He might have been held liable for a breach of covenant for quiet enjoyment which the law implies in such a lease (*Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170), or for failing to keep his promise after notice to remove the cause of damage. The plaintiff cannot complain that his liability was not put specifically upon these grounds. The charge in this respect was not merely acquiesced in, but in various propositions submitted by the plaintiff, it was assumed that if the evidence justified a finding that injury was caused to the tenants by his acts or negligence, and that the claim for damages so occurring was assigned before suit, the defendants might have the benefit of it. The objection was not made that liability so incurred was not the proper subject of a counterclaim. It is, therefore, too late to raise it now. (*Horne Ins. Co. v. West Trans. Co.*, 51 N. Y. 93; *Gleadell v. Thomson*, 56 id. 194.) We find no other point in the appellants' argument which requires discussion or affords ground for this appeal.

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The judgment of the court below should, therefore, be affirmed.

All concur, except RUGER, Ch. J., who took no part.

Judgment affirmed.

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EDSON F. EMERY Respondent, v. GEORGE BALTZ et al.,
Appellants.

A surety, bound simply for the fidelity and honesty of his principal in the performance of a contract of employment, may revoke and end his future liability, either where the guaranteed contract has no definite time to run, or where it has such time, but the principal has so violated it that the creditor may lawfully terminate it on account of the breach.

Where the principal commits an act of dishonesty and is unfaithful to his trust, the employer may end the contract, and the surety may require this to be done.

The complaint in an action against sureties upon the bond of H., as general agent of an insurance company, set forth the contract of employment, the giving of the bond by H. conditioned for the faithful performance of his duties, and for an accounting and payment over by him each month of all moneys in his hands, and a failure to account and pay over; also the bringing of an action against H., after notice to the sureties of default, and the intention to sue, and a recovery of judgment in said action, the issuing of execution and return thereof unsatisfied. The answer averred that defendants "have no knowledge or information sufficient to form a belief as to whether" the agent was at the time of the commencement of the action indebted to plaintiff "in the sum mentioned in the complaint, or in any other sum, and therefore deny the same." *Held*, that the denial was merely of a legal conclusion and put in issue none of the facts alleged in the complaint.

It appeared that in the action against H. an order of arrest was issued, under which he was arrested, and while in jail plaintiff proposed to him that if he would give an offer of judgment for plaintiff's demand, the latter would release him from jail. Such offer was thereupon given, and he was released; he remained in the State for two months thereafter. *Held*, that such release did not operate to discharge the sureties. Defendants offered to prove that after a part of the alleged indebtedness had accrued, and after a breach of his contract on the part of H., the sureties notified plaintiff that they desired to withdraw their bond "and not be liable for any business" thereafter done; that to induce them to remain, plaintiff promised that he would require H. to account monthly and would

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see "that he did not get behind;" but if he did "he would immediately stop his business" and notify the sureties of the amount of the default; that, relying on this promise, the sureties suffered their liability to remain, and that plaintiff did not perform, but suffered the liability to increase without notification and without stopping H.'s business. This evidence was objected to as immaterial, and excluded. *Held* error.

It was objected here that the offer did not allege that the sureties knew of the default of H. when they gave such notice. *Held*, untenable; as this was fairly implied, and because if the objection had been taken on trial, it might have been explicitly asserted.

It was also objected that the offer did not aver that the liability of the sureties had been increased beyond the one additional default of which they took the risk. *Held*, that the offer to show that plaintiff failed to stop H.'s business implied that plaintiff allowed it to continue and the indebtedness to increase after a time when, by the agreement, it should have been stopped.

(Argued December 17, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made June 23, 1880, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was upon a bond executed by defendants as sureties for one Hack.

The material facts are stated in the opinion.

James M. Humphrey for appellants. The defendants were sureties for Hack and not principal debtors, and the release of Hack from the order of arrest by active interference of the plaintiff, and without the consent of the defendants, discharged them. (Code of Procedure, §§ 186, 187, 200; *Hayes v. Ward*, 4 Johns. Ch. 123; *Ducker v. Rapp*, 67 N. Y. 464; *Bangs v. Strong*, 10 Paige, 11; *Brown v. Reggins*, 3 Kelly, 405; *Curran v. Colbert*, id. 239; *Com. B'k of Lake Erie v. Western Reserve B'k*, 11 Ohio, 444; *Dixon v. Ewing*, 3 id. 280; *Carpenter v. King*, 9 Metc. 511; *Ducker v. Rapp*, 67 N. Y. 464; 1 Story's Eq. Jur., § 325; *Schroepell v. Shaw*, 3 Comst. 446.) Any arrangement between the creditors and principal debtor for the easement of the latter to the prejudice of the sureties releases them. (*Jones*

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v. *Bullock*, 3 Bibb, 467, 469; *Mahew v. Crickett*, 2 Swanst., 185; 1 Pet. [U. S.] 573; 5 How. [U. S.] 301; Code of Procedure, § 186.) The defendants had a right at any time to terminate their liability on the bond for all future defaults by proper notice. (*Bonaer v. Cox*, 6 Beav. 110; *Livingston v. Bartles*, 4 Johns. 478; 21 How. [U. S.] 66.) A surety may always inquire into the good faith of any settlement between his principal and the creditor. (*U. S. v. Boyd*, 5 How. [U. S.] 29.) The court erred in excluding the evidence offered as to the contract, the fulfillment of which by Hack the defendants guaranteed. The evidence was competent as a defense without being alleged for a counter-claim. It was also competent as a counter-claim notwithstanding Hack was not a party to the action. (*Star F. Ins. Co. v. Palmer*, 41 N. Y. Sup. Ct. 267; Code of Procedure, § 69; Code of Civil Procedure, § 3339; *Coffin v. McLean*, 80 N. Y. 561; *Davidson v. Alfura*, 10 Weekly Dig. 56; *Van Brant v. Day*, 81 N. Y. 251; *Davis v. Tolmin*, 77 id. 280; *Smear v. Woods*, 74 id. 615.) Admissions in the answer, if relied on by the plaintiff to sustain his action in the place of proof of facts, must be all taken together. (*Goodyear v. De La Vergne*, 10 Hun, 537; *Albro v. Figuera*, 60 N. Y. 630; *Rouse v. Whetiad*, 25 id. 170.)

John G. Milburn for respondent. The motion for a non-suit was properly denied. The *prima facie* cause of action was admitted by the pleadings. (2 Wait's Pr. 418, etc.; Code [Bliss], 406, o, and c. c.) There is not any obligation on the part of a party to whom a guaranty or indemnity is given to use diligence in investigating the accounts of the surety. (2 Story's Eq. Jur., § 325; *Trent Nav. Co. v. Harley*, 10 East, 84; *Nares v. Rowles*, id. 514; *London Ass. Co. v. Ruckle*, 4 Moore, 153.) The release of Hack from jail and the attendant facts show no defense to the action. (Code of Procedure, § 288; *Meech v. Loomis*, 28 How. Pr. 209; 14 Abb. Pr. 428.) The discontinuance of a suit brought against the principal does not discharge the surety. (*Fullin v. Matthews*, 15 Johns 432.) A

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surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counter-claim. (*Lasher v. Williamson*, 55 N. Y. 619.) As this is a legal action, the defendants cannot, by setting up an equitable defense or counter-claim, compel the plaintiff to convert it into an equitable action. (*Webster v. Bond*, 9 Hun, 437.) The referee properly found that the Haberstro note was not received in payment and his finding was in accordance with the presumption of law. (*Noel v. Murray*, 13 N. Y. 167; *Gibson v. Foley*, 46 id. 637.)

FINCH, J. The motion for a nonsuit upon the ground that the pleadings did not admit plaintiff's cause of action, and no other proof of it was given, was properly denied. The complaint recited in full an agreement dated April 27, 1874, between the plaintiff and Hack, by the terms of which the latter was employed as a general agent to solicit and obtain policies of insurance in the Life Association of America; he to collect premiums and remit them to the plaintiff after deducting his commissions on the first day of every month, making a report at that time; and to "regard and treat all the premiums that may at any time come to his hands, sacredly, as trust funds," and not to "use them, or permit them to be used, for any purpose except to remit them as aforesaid." The complaint further alleged the execution and delivery of a bond, required by the terms of the contract, signed by said Hack, and also by the defendants, Baltz & Scheu, as sureties, conditioned for the faithful performance by Hack of his duties as general agent "in accordance with the terms of the contract of appointment," and on the first of every month account for and pay over all moneys in his hands. By the terms of the contract, Hack's employment was to continue for three years, unless terminated by mutual consent. The complaint then alleged that between the date of the contract and the 12th day of April, in the next year, Hack collected a large sum for which he did not account, and had not paid over upon request and according to the terms of the contract, "of all of which the defendants have had due

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notice." It was then averred that on the 7th of May, 1875, the plaintiff began an action against Hack, after notifying the defendants of his intention so to do, and of Hack's default, and in the following October recovered judgment and issued execution, which was returned wholly unsatisfied, and that the defendants, though requested, had paid no part of the deficiency. There was no denial in the answer of any of these facts. What was claimed to be such was in these words, viz.: "the defendants aver that they have no knowledge or information sufficient to form a belief as to whether or not the said Michael Hack was at the time of the commencement of this action indebted to the said plaintiff in the sum mentioned in the complaint, or in any other sum, and therefore deny the same." This was merely a denial of a legal conclusion, and put in issue no fact alleged. The cases relied on by the defendants (*Goodyear v. De la Vergne*, 10 Hun, 537; *Albro v. Figueroa*, 60 N. Y. 630) were those in which there were denials except as admitted, and a reliance by the plaintiff on affirmative admissions. Here, on the contrary, there was no effectual denial.

The referee found as a fact, that after the commencement of plaintiff's action against Hack, "an order of arrest was made in that action, and the defendant Hack was arrested thereon, and committed to the jail of Erie county; that while said Hack was in jail on said order of arrest, the plaintiff proposed to him that, if he would give an offer of judgment for his demand in that action, he would release him from jail; that such offer of judgment was given by said Hack, and thereupon the plaintiff did release him from jail." The referee then held, as a conclusion of law, that such facts did not operate to discharge the sureties. To this they excepted, and their counsel now argues that the "order of arrest, with the arrest" was a security for the satisfaction of plaintiff's judgment, to which security the sureties were entitled to be subrogated, and the act of release from imprisonment impaired their rights. There was never any request by the sureties that plaintiff should sue, or having sued should arrest, or having arrested should continue the imprisonment. The question raised, therefore, stands only upon the

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bare relation of the parties as principal and surety. Flowing from that relation alone, the plaintiff was not bound to sue Hack, or to arrest or imprison him. The omission to do either invaded no right of the sureties. They might have paid the debt and been subrogated to the creditor's remedies. What the creditor did, so far as he went, was for their benefit. The order of arrest laid the foundation for an execution against the person. The right to that execution all the time remained and remains still, since the release from jail did not operate to vacate the order of arrest, or affect the right to a body execution. (*Meech v. Loomis*, 28 How. Pr. 209; 14 Abb. Pr. 428.) If it be said that the imprisonment under the order of arrest would have held Hack within the jurisdiction, and liable to a final execution, a sufficient answer is that for two months after his release he remained in the State, and there is no evidence to show that during that period the sureties might not have paid the debt and caused his arrest on final execution. So far as we know, the fact that they did not do it was their fault alone, and not occasioned by the plaintiff. We do not see how the rights of the sureties have been in any manner infringed.

But there is a much more serious question in the case. The defendants offered to prove that *after* a part of the indebtedness claimed by plaintiff had accrued, and after Hack had failed to perform his contract, and so was in default, the sureties notified the plaintiff that they desired to withdraw their bond "and not be liable for any business that Hack should do after that;" that to induce them to so remain liable, the plaintiff promised to "require Hack to account monthly" and would see "that he did not get behind," but if he did "he would immediately stop his business," notify the sureties, and tell them the amount of the default; that in reliance upon this promise and condition, the sureties suffered their liability to remain; and that plaintiff did not perform the condition, but suffered the liability to increase without their knowledge, without notification, and without stopping Hack's business, until the whole sum now claimed had accrued. The evidence was rejected as immaterial and the sureties excepted.

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A surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed, and certain to become due, may revoke and end his future liability, in either of two cases, viz.: first, where the guaranteed contract has no definite time to run; and, second, where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach. (*Hunt v. Roberts*, 45 N. Y. 691; *McKecknie v. Ward*, 58 id. 541; *Burgess v. Eve*, L. R., 13 Eq. Cases, 450; *Phillips v. Foxall*, L. R., 7 Q. B. 666; *Sanderson v. Aston*, L. R., 8 Exch. 73.) When the person employed commits an act of dishonesty, and is unfaithful to his trust, the employer may end the contract and the trust for his own protection, and what he may do, and ought to do for his own safety, the surety may require to be done for him. The sureties in this case guaranteed the fidelity and honesty of Hack. The funds to be collected by him were specified in the contract as "trust funds" and to be "sacredly" treated as such; when Hack diverted them to his own use he did an act of dishonesty and proved himself unworthy of trust. At this point the sureties intervened. Liable for the existing loss, they had the right to say that they should not be made liable for more; that the plaintiff had not liberty to keep a man known to be dishonest in a position to embezzle more money at the expense of the sureties. They did assert that right, but were induced to waive it for the time being, on the assurance that any new act of dishonesty should be at once reported and further opportunity prevented. Thus lulled into security, the conversion ran on and the liability increased, until the amount now claimed was reached. The offer involved a defense for the sureties, to some extent and in some amount, unless certain technical criticisms justify its rejection.

It is said no such defense was pleaded. No objection was made on that ground. It was pleaded as occurring before any default, and if such objection had been made an amendment of the answer might justly have been allowed, asserting that it occurred also after default.

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It is said that the offer did not allege that the sureties knew of the default of Hack when they had their interview. We think that is fairly implied, but if objection had been taken on that ground, it might have been directly and explicitly asserted.

It is said that the offer did not aver that the liability of the sureties had been increased beyond the one additional default of which they took the risk. That also is true in the sense that it was not explicitly averred, but the offer to show that plaintiff "failed to stop said Hack's business" quite clearly implies that plaintiff allowed it to continue, and an indebtedness to increase after a point of time when by the terms of the agreement it should have been stopped. If the offer was very general the objection to it was of the same character, merely that it was immaterial, and as we can see in it the elements of a possible defense we think it ought not to be construed too rigidly for the purpose of justifying its rejection.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except EARL, J., not voting.

Judgment reversed.

94 415
158 588

OLIVER P. C. BILLINGS, as Receiver, etc., Appellant, v. GEORGE C. ROBINSON, Respondent.

Where a stockholder of a manufacturing corporation, whose stock has not been fully paid in, in good faith makes an absolute and valid transfer of his stock to another, he is not liable for calls made after the transfer.

Defendant subscribed for fifty shares of the stock of a manufacturing corporation; by the subscription agreement he promised to take and pay the par value of said shares, twenty per cent at a date specified, and the balance as called for thereafter by the trustees. Certificates for the said shares were subsequently issued to defendant, and he paid various calls thereon. Thereafter defendant for the avowed purpose of withdrawing from the company, and ending his liability, transferred his stock to M., in the presence of the trustees of the corporation, and resigned his position as trustee, under an agreement, made with knowledge on the part of all the stockholders who had paid on their stock, to the effect that M..

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and others acting with him, should lend to the company, which agreed to borrow, money enough to pay its existing indebtedness in excess of assets, and M. also executed an agreement to indemnify defendant against claims of creditors, and against future calls. It was also agreed that good checks for the amount of the indebtedness of said company should be placed in defendant's hands to be surrendered as the debts were paid. Defendant's resignation was accepted, his place filled, the transfer was entered on the company's books, defendant's stock account balanced, his certificates were surrendered to and accepted by the company, and attached to the original stubs with the receipt of the company added, and the loan was made as agreed. In an action to recover the balance unpaid on the stock, *held*, that conceding the subscription agreement to pay for the stock was not merged in the implied agreement raised by the after-issue and acceptance of the certificates, but remained a separate and continuing agreement, as to which *quare*, defendant could be released and discharged therefrom by a valid agreement between him and the corporation for the substitution of a new debtor, and that the transaction stated amounted to such a release

Also *held*, that as plaintiff, who sued as receiver of the corporation, was not shown to represent any creditor having any equities against defendant, in virtue of his having been a shareholder, he stood simply in the position of the company; and, as it could not, he was not entitled to maintain the action.

(Argued December 12, 1883; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made November 3, 1882, which affirmed a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 28 Hun, 122.)

This action was brought by plaintiff, as receiver of the Marshall Packing Company, a corporation organized under the act providing for the incorporation of manufacturing corporations, to recover a balance alleged to be due upon a subscription for fifty shares of the capital stock of said company, also to recover a balance alleged to be unpaid upon fifty other shares which had been assigned to him.

The facts so far as material appear in the opinion.

James L. Bishop for appellant. The defendant being a trustee of the company down to the very day of the transfer,

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it was his duty to know all about the financial condition of the company, and he must be presumed to have knowledge of its insolvency. (*Nathan v. Whitlock*, 2 Edw. Ch. 215; *Paine v. Mead*, 59 How. Pr. 318.) A transfer of shares in a failing corporation made by the transferrer, with the purpose of escaping his liability as a shareholder, to a person who from any cause is incapable of responding in respect to such liability, is void as to the creditors of the company and as to the shareholders, although as between the transferrer and the transferee it was valid. (*Nat. B'k v. Case*, 99 U. S. 628, 632; *Bowden v. Johnson*, 107 id. 251; *McLaren v. Franciscus*, 43 Mo. 452; *Provident S'vs B'k Inst. v. Jackson*, 52 id. 556; *Nathan v. Whitlock*, 3 Edw. Ch. 215; 9 Paige, 152; *Bowden v. Santos*, 1 Hughes, 158; *Marcey v. Clark*, 17 Mass. 330; *Johnson v. Laflin*, 6 Cent. L. J. 124; Angell & Ames on Corp. [4th ed], § 623; Thompson on the Liability of Stockholders; *Veiller v. Brown*, 18 Hun, 571; *Sawyer v. Upton*, 1 Otto, 56, 60; *Malone v. Lamar Ins. Co.*, 80 Ill. 446; *Zeikel v. Joliet Opera House Co.*, 79 id. 334; *Union Ins. Co. v. Frear Stone M'fg Co.*, 97 id. 549; *Sawyer v. Hoog*, 17 Wall. 610.) Under the English authorities a transfer of the stock, for the purpose of avoiding liability, must be made in good faith, and with the intent to divest the interest of the transferrer, and to render the transferee the absolute *bona fide* owner of the shares. (*Nat. B'k v. Case*, 99 U. S. 628; *Chinnock's Case*, Johns. 714; *Burns' Case*, 2 DeG., F. & J. 275; *Hyams' Case*, 1 id. 75; *Re London Assurance Co.*, 2 id. 683; *Budd's Case*, 3 id. 297; *Kentrea's Case*, 39 L. J. Ch. 193; *Payne's Case*, L. R., 9 Eq. 223; *Davis v. Stevens*, 8 Rep. 710; *Briggs' Case*, 2 D. & S. 459; *King's Case*, 40 L. J. Ch. 361; Lindley on Part. 1433; *DePass' Case*, 4 DeG. & J. 544; *Nat. B'k v. Case*, 99 U. S. 628, 632.) If the debts of the company, existing at the time of the alleged transfer of stock by the defendant, had been fully paid, that would not relieve the defendant from liability for the unpaid balance due on the stock held by him. (*King's Case*, 30 L. J. Eq. 361; *Veiller v. Brown*, 18 Hun, 570, 578.) The defendant is liable on his subscriptions notwithstanding

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the transfer of the stock. (*Schenectady S'vs B'k R. Co. v. Thatcher*, 11 N. Y. 102; *Dayton v. Borst*, 31 id. 435; *B. & N. Y. C. R. R. Co. v. Dudley*, 14 id. 836; *L. O. R. R. Co. v. Mason*, 16 id. 451; *Phœnix W. Co. v. Badger*, 6 Hun, 294; 67 N. Y. 294; *Mann v. Cooke*, 20 Conn. 177; *Seymour v. Sturges*, 26 N. Y. 145; *Sagony v. Dubois*, 3 Sandf. Ch. 466; *N. R. R. Co. v. Miller*, 10 Barb. 260; *Mann v. Currie*, 2 id. 294; *S., etc., Plank R. Co. v. Thatcher*, 11 N. Y. 102-119; *Hawley v. Upton*, 102 U. S. 316; *Nathan v. Whitlock*, 9 Paige, 152, 159; *Bowden v. Johnson*, 107 U. S. 251, 255.) It was no defense to this action that the defendant was induced to sign the subscription paper by fraud. (*Briggs v. Cornwell*, 11 Weekly Dig. 382, *Oaks v. Turquand*, 2 H. of L. 325; *Upton v. Tribilcock*, 91 U. S. 50.) This action was properly brought in the name of the plaintiff as receiver, and it was not necessary to make other stockholders parties. (*Van Wagner v. Clark*, 22 Hun, 497; *Cuykendall v. Miles*, 14 Rep. 69.)

Joshua M. Van Cott for respondent. The appellant is concluded by the referee's finding, on competent and persuasive evidence, that the respondent sold the one hundred shares to Marshall absolutely and in good faith. (*Quincey v. White*, 63 N. Y. 375; *Bergin v. Wemple*, 30 id. 319; *Colwell v. Lawrence*, 38 id. 71.) This action, not being by or on behalf of a creditor, but by the receiver as representing only the rights of action of his corporation, the transfer and the entry thereof upon the books was a due compliance with the by-law, and with section 8 of the act of 1848. The requirements of section 25 of said act apply only where creditors sue stockholders. (*Isham v. Buckingham*, 49 N. Y. 216; *Johnson v. Underhill*, 52 id. 203; *Cutting v. Damersel*, 88 id. 411; *Wheeler v. Mil-lar*, 90 id. 354.) A subscriber for shares of a corporation is relieved from liability for future calls on the stock after a due transfer of the subscribed shares. (*Isham v. Buckingham*, 49 N. Y. 217; *Seymour v. Sturges*, 26 id. 139; Angell & Ames on Corporations, § 534; 1 Redfield on Railways, part 2, §§ 53-4; *Mann v. Currie*, 2 Barb. 294; *S. C.*, 25 id. 413; *Cole v. Ryan*,

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52 id. 68, 203; *McCulloch v. Moss*, 5 Denio, 566; *Palmer v. Lawrence*, 3 Sandf. 151; 1 Lindley on Partnership [3d ed.], 654, 655, 657.) The relation on which the shareholder's liability to contribute a proportion of the capital is bottomed may be terminated by the act of the corporation, forfeiting the shares. (*Small v. Herkimer Manuf'g Co.*, 2 Comst. 330; *Mills v. Stewart*, 41 N. Y. 384.)

FINCH, J. We may dismiss all consideration of the defendant's alleged liability for the fifty shares of stock purchased by him with the single remark that, as those shares were transferred to Marshall in a valid and effectual manner, and such transfer was found by the referee as matter of fact to have been absolute and in entire good faith, which finding has been reviewed and affirmed by the General Term, it follows that no liability for calls made after the transfer rested upon him, and to that extent we must hold the judgment to have been right.

But the question as to the defendant's liability for the other fifty shares upon the original subscription remains, and led to a difference of opinion in the General Term. It was held by the majority, and has been argued before us, that the subscription contract of a promoter to take and pay for shares of stock as yet unissued and non-existent must be construed in connection with the statute, which, upon a regular transfer of the stock made in good faith, releases the seller from future calls and substitutes the new holder as debtor to the corporation for their amount; that the express agreement of the subscription is identical with the implied agreement of an after purchaser; and that when the subscriber actually takes his shares and assumes the position of a stockholder, his express agreement evidenced by the subscription is merged in the implied agreement raised by the issue to him of the stock, and for future calls he is liable only as a shareholder and under the provisions of the statute. As to the soundness of this proposition we are not all free from doubt, and do not reason about it or pass upon it because there is another view of the case in which we do agree.

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Granting for the sake of the argument that the subscription agreement of Robinson and his promise to pay was not merged in the implied agreement raised by the after-issue and acceptance of the stock, but remained a separate and continuing liability, from which no act of his except payment could release him, it is still true that he could be released and discharged by a valid agreement between himself and the company for the substitution of a new debtor in his place and stead.

Authority is not wanting for the doctrine that where the subscriber, after receiving his shares, made transferable upon the books of the corporation by the terms of the certificate, makes such transfer in good faith, and the company accepts a surrender of his certificate, and issues a new one to the transferee and credits him with the stock upon its books, the transaction amounts to a consent by the company to a release of the old stockholder from liability for future calls, and a substitution of the liability of the transferee. (*Cowles v. Cromwell*, 25 Barb. 414; *Isham v. Buckingham*, 49 N. Y. 220.) But in this case we need not go so far as that, for other circumstances occurred clearly indicating the intent of the parties, and establishing by their mutual assent such release and substitution.

Robinson made his transfer to Marshall in the presence of the trustees of the corporation, and for the avowed purpose of withdrawing from the company and ending his liability because he was dissatisfied with its management. The company was embarrassed for the lack of money, and many of the original subscribers had paid nothing on their subscriptions. Robinson faced the emergency fairly. He talked with most, if not all of the trustees, and avowed his determination to institute proceedings to wind up the company, unless some other arrangement could be made. None of the trustees could have failed to understand that Robinson was determined to end his liability in some manner, and that any arrangement to supersede a dissolution must be framed equally to end such liability. With this emergency fairly presented, the negotiations ran on. Marshall desired to obtain control of the company and put his friends in the management. To do so effectually, both he and the trustees

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realized that an existing corporate indebtedness of about \$13,000 in excess of assets should be paid and discharged to protect the retiring shareholder from possible liability to the creditors holding it. To accomplish this purpose, Marshall and his friends agreed to lend the company, and the company agreed to borrow the money needed to pay such indebtedness after the retirement of Robinson, and since his transfer was to precede that payment, and his entire release from liability, to make him safe in so doing, Marshall executed an agreement to indemnify him against any claims of creditors of the company and against any future calls on the unpaid stock. This stipulation shows an understanding on both sides that Robinson's action was based upon the condition of an entire release from liability. Robinson, however, did not rely upon these covenants alone; for it was further arranged that good checks for the amount of the \$13,000 should be placed in his hands at the moment of transfer, to be surrendered as the corporate debt was paid, and \$8,000 of such checks were in fact handed to the attorney of Robinson. As Marshall's covenant, as to one liability, was thus merely an additional and perhaps unnecessary security, so his further covenant as to future calls must be understood as taken out of greater caution. All this was clearly understood by the trustees. We cannot discover that any director or shareholder of those who had paid on their stock was outside of actual or fairly inferred knowledge of the arrangement intended. Thereupon Robinson made his transfer to Marshall and resigned his office as trustee, parting with all control over the future of the company, and accepted fifty cents on the dollar in the notes of Marshall. Others of the trustees did the same thing, and Marshall's friends were put in their places and his control secured. The transfer was entered on the books of the corporation; Robinson's stock account which stood debited with one hundred shares, being credited with one hundred shares transferred to Marshall; and the certificates of Robinson surrendered to and accepted by the company, and attached to the original stubs with the receipt of the corporation added. We do not think it possible to mistake the tenor of this transaction to which the

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corporation assented and which it aided in carrying out. On all sides it must have been clearly understood that Robinson, in parting with his stock and resigning as a director, and so losing all power or influence over the future of the corporation, was doing so on the condition that Marshall should be accepted by the corporation as the substituted debtor for all liabilities of Robinson in any manner connected with his shares. To treat the transaction differently, to accept his resignation and fill his place and assent to his transfer under the circumstances, and yet hold him liable for unpaid calls, would operate as little less than a fraud upon him. The receiver, who is plaintiff, is not shown to represent any creditor having any equities against Robinson in virtue of his having been a shareholder. The purpose of the transaction was to satisfy all such equities and leave no room for their after existence.

So far as the case shows, the object was accomplished, and the receiver represents in this action only the corporation which assented to the substitution of Marshall's liability for that of Robinson. We think such assent was sufficiently established. The argument to the contrary impresses us rather as technical than just. It is urged that plaintiff was bound to prove not only the company's consent to a transfer, but its consent also to a release. We think that was established. Much more than a mere consent to a transfer was shown. A release of Robinson and a substitution of Marshall as the debtor was the exact point of the negotiation. And the corporation not only assented to the transfer, but borrowed the \$13,000 necessary to release Robinson from possible liability to creditors; the new board formally ratified the loan, and gave a confession of judgment for the amount to the lenders. That no formal resolution of release was adopted is true, but that was not necessary where the whole transaction rested upon such foundation. It is said that the corporation had no power to prevent a transfer of stock, and were bound to consent, and so the transfer does not prove consent to a release. But the case does not stand upon the bare consent to a transfer. Robinson was not merely selling the stock for fifty cents on the dollar, payable in the notes

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of the purchaser. He required as a condition of the transfer, without which he would not have made it, an entire end of his liability, to effect which, positive and very important action of the company was necessary, and when they took that action to complete the understood arrangement, they assented to the plan in all its known details. They might have refused their part in it, and if they had, would have prevented the transfer made, and brought about an effort to dissolve the company. It is added that there is no proof that the company accepted Marshall's liability by issuing new shares to him. But without that, the transfer does sufficiently appear upon the stock ledger, and Marshall became liable as the new or substituted holder, even though no formal certificates were issued to him. If the company did not transfer the stock to Marshall according to all the prescribed forms, that was its own fault and not that of the defendants. (*Isham v. Buckingham, supra.*)

It was said in *Seymour v. Sturgess* (26 N. Y. 141), that in actions upon unpaid subscriptions for stock, and against assignees of stock not fully paid for, courts have had respect to the terms of the contract and certificate, and the circumstances of the case. The attendant circumstances in the present case, the nature of the negotiation, the understood purpose, and the action of the company in accordance therewith, satisfy us that Marshall was accepted as the substituted debtor, and Robinson released.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

94	423
173	487
1173	491

JOHN H. N. PATRICK, Respondent, v. WILLIAM F. SHAFFER,
Appellant.

In an action upon a judgment recovered by plaintiff against defendant in another State, defendant set up as a counter-claim an alleged loan by him to plaintiff of \$12,500. It appeared that in the former action, which was for money loaned, defendant denied the loan, and set up as a defense

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and gave evidence on the trial thereof tending to show that he advanced the money set up as a counter-claim to one to whom plaintiff was indebted, and who held title to certain lands as security therefor, under an agreement that the land should be conveyed to defendant, to be held as security, and to be conveyed to plaintiff on payment of the loan, and that the alleged loans made by plaintiff were simply payments. Plaintiff, on the other hand, gave evidence to the effect that his interest in the land was sold absolutely to defendant, who paid the \$12,500 as the purchase-price and received a deed from the one holding title. *Held*, that the question whether the \$12,500 was a loan was necessarily involved in, and determined by the former action, and the judgment therein was conclusive; also that the fact that the matter was set up as a defense in the former action, not as a counter-claim, was immaterial.

(Submitted December 11, 1883 ; decided January 15, 1884.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 3, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and denied a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

Elihu Root & Willard Bartlett for appellant. A demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law. (*Cromwell v. County of Sac*, 94 U. S. 353 ; *The Packet Co. v. Sickels*, 5 Wall. 592.)

Henry A. Root for respondent. A claim which has been set up by way of either defense or recoupment, and disallowed, cannot be used as a counter-claim in a subsequent action. (*Birckhead v. Brown*, 5 Sandf. 134, 145 ; 2 Smith's L. C. [7th Am. ed.], H. & W. 771 ; *Demarest v. Darg*, 32 N. Y. 281 ; *Wilder v. Case*, 16 Wend. 583 ; *Rogers v. Rogers*, 1 Hilt. 194.) Upon such evidence as was admitted without objection, the Nebraska judgment is a bar to the counter-claim. (*Clemens v. Clemens*, 37 N. Y. 59, 73 ; *Harris v. Harris*, 36 Barb. 88, 94 ; *Kerr v. Hays*, 35 N. Y. 331, 337 ; *Collyer v. Collins*, 17 Abb. Pr. 467 ; *Ehle v. Bingham*, 7 Barb. 494.) A judgment on a

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general verdict, where two or more issues are involved, is *prima facie* evidence that all were passed upon, and a bar in regard to any one of them, until the party against whom the verdict was rendered has shown that it was not passed upon. (*Yonkers v. Bishop*, 1 Daly, 449; *White v. Simonds*, 33 Vt. 178; *Day v. Vallette*, 25 Ind. 42; *Henderson v. Kenner*, 1 Rich. 474; *Bayot v. Williams*, 3 B. & C. 235; 1 Greenleaf on Evidence, § 532.) A judgment is conclusive not only as to the matters actually litigated, but as to every thing that might have been litigated in the former action. (*Cromwell v. County of Sac*, 94 U. S. 351, 352; *Aurora City v. West*, 7 Wall. 82, 96; *Dunham v. Bower*, 77 N. Y. 76; *Hayes v. Reese*, 34 Barb. 156; *Bruen v. Hone*, 2 id. 586; *Casler v. Shipman*, 35 N. Y. 533, 545; *Jordan v. Van Epps*, 85 id. 427, 436; *Smith v. Smith*, 79 id. 634; 2 Smith's L. C. [7th Am. ed.], H. & W. 767; *Castle v. Noyes*, 14 N. Y. 329; *Embury v. Conner*, 3 id. 511, 522; *Jennison v. Springfield*, 13 Gray, 544.) This case should therefore be treated as though the principal of the alleged debt had been (as it was) the one matter in issue, and then the general rule applies that a counter-claim founded on facts that would have been fatal to the plaintiff's recovery in the former action is barred by the former judgment, whether set up there or not. (*Dunham v. Bower*, 77 N. Y. 76.)

MILLER, J. This action was brought to recover the amount of a judgment obtained by the plaintiff against the defendant, in a court of general jurisdiction in the State of Nebraska.

The answer of the defendant admitted the recovery of the judgment, and that no part thereof had been paid, and set up as a defense a counter-claim, in which he alleged that he had paid \$12,500 to the use of the plaintiff, to be repaid upon demand, and that he had demanded payment and that no part thereof had been paid. The plaintiff served a reply, in which he set up an extract from the defendant's answer in the Nebraska suit, which shows that the counter-claim pleaded in this action was interposed, and constituted a defense to the action in which the plaintiff recovered judgment in the State of Ne-

braska. It was claimed that the verdict rendered in that action was conclusive in the present case. The real issue presented upon the trial of this action was whether the judgment recovered in the State of Nebraska was conclusive against the counter-claim interposed in the answer of the defendant in the case at bar. It is apparent that the claim of the plaintiff in this action is the same substantially and in fact as the demand for which a recovery was had in the State of Nebraska. The plaintiff there claimed to recover for moneys lent by him to the defendant. The defendant denied that the plaintiff had ever lent any money to him, and claimed that he had lent the respondent \$12,500 several years before the commencement of the suit in Nebraska, and that the moneys which the plaintiff claimed to recover were payments upon the loan of \$12,500. It appears from the record before us, that upon the trial of the suit in Nebraska, the defendant introduced evidence to prove that he had advanced to and for the use of the plaintiff the sum of \$12,000, to discharge a debt due from the plaintiff to one Augustus Kountze, who held title to a certain tract of land in Nebraska, as security for such indebtedness; that an agreement had been made between the parties, providing for a conveyance of the land by Kountze to the defendant, who should hold it as security for the sum which he had advanced; on the other hand the plaintiff's testimony established that the plaintiff formerly owned an undivided half of two hundred and seventy acres of land in Omaha, Douglas county, Nebraska, the legal title of which was held by said Kountze, with other collaterals, to secure \$5,200 which the plaintiff owed to the Omaha Bank; that in 1870, the plaintiff sold this undivided half to Shaffer, for \$12,500, and Shaffer took a deed directly from Kountze; that subsequently the plaintiff lent the defendant in five sums about \$7,000. It will be seen that the evidence was contradictory, as to whether the plaintiff lent the defendant the money claimed by him, or whether it was a payment upon the \$12,000, which the defendant claimed that he had loaned the plaintiff. The issue upon the trial of the Nebraska case really was, whether the moneys received from the

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plaintiff were loans, or whether they were payments of instalments upon the mortgage alleged to have been given by plaintiff to defendant for money which plaintiff had borrowed from defendant, or in other words, was the deed absolute, or was it a mortgage. It will be perceived that the defendant not only denied that there was any loan, but he set up in the third paragraph of his answer precisely the same facts which are here pleaded as a counter-claim. There is no substantial difference in the answer in this respect in the case considered and in the third paragraph of the answer in the Nebraska action, except that here he demands affirmative relief by way of counter-claim.

If the jury in the Nebraska case had believed the version of the transaction as given by the defendant, they would have found that the moneys claimed by the plaintiff were not loans but payments upon the mortgage which defendant held upon plaintiff's lands. Having found to the contrary, it would seem to follow that the real question in the case, as to the nature of the transaction, was tried and disposed of adversely to the defendant upon the issue presented, and is conclusive in this action against the defendant, as was held upon the trial. It is said, however, that there was another and separate defense in the Nebraska suit upon which judgment may have gone against the defendant there, without necessarily involving the truth of the facts which were pleaded as a second and separate defense; this was a denial, in the second paragraph of the answer, that the plaintiff loaned to the defendant the sum claimed or any sums whatever. The argument of the defendant's counsel is, that the plaintiff claimed that he had loaned the defendant certain moneys, which was denied by the defendant; that the defendant says, however, that he had received certain sums from the plaintiff which were paid on account of a mortgage debt the plaintiff owed him, and that the question which the jury in the Nebraska case were thus required to pass upon was whether the money which had been paid by the plaintiff to the defendant was paid on account of this mortgage debt, or was a separate and independent transaction in the nature of a loan;

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that the finding of the jury is that it was a separate transaction in the nature of a loan, and this does not determine the question whether a mortgage debt existed or not. We are unable to perceive the force of the position contended for. The evidence in reference to the loans, as well as that relating to the mortgage debt, all had a bearing upon the right of the plaintiff to recover in the Nebraska case. The defendant claimed that no loans were made, but that the moneys were paid upon the mortgage debt. This claim is not well founded, for it is manifest these payments were so inseparably connected with the loans that it is difficult to see how a discrimination could be made by the jury which would separate the one from the other. If no loans were made the alleged mortgage debt did exist; if they were made then there was no mortgage debt. This was the issue presented. It related to one transaction, and it would be unreasonable to hold that a distinction exists which authorizes the conclusion that the jury merely passed upon the question whether there were loans, without considering the question arising as to the existence of the alleged mortgage debt. In view of the evidence introduced, showing that the loans had been made, and the testimony which tended to establish that these loans were payments of installments upon the alleged mortgage debt, and the conflict in the testimony in regard to the nature of the transaction, it cannot, we think, be argued that there was no issue made upon the trial in reference to the existence of the mortgage debt. Nor is it a reasonable assumption, under the circumstances, that the jury might have found that, although the loans were made to the defendant at the time claimed, it was not convenient for the plaintiff then to make absolute payment on account of the alleged mortgage debt. It cannot be said that the judgment in the Nebraska case was merely a decision that the moneys claimed in that suit were not repayments on account of that advance. Without deciding whether the claim for the \$12,000, made by the defendant, was a valid and subsisting demand, in no sense can the judgment be regarded as merely determining that the moneys claimed by the plaintiff were separate and independent

loans, without any regard whatever to the validity of the defendant's claim set up in the third paragraph of his answer. The decision clearly embraces the question presented as to the loans being made, as well as the claim of the defendant that they were only payments upon the alleged mortgage debt.

The position of the defendant is the same in both cases, and there is no ground for claiming that the mortgage debt was there pleaded as a matter of inducement to one of the defenses there interposed, while here it is an affirmative claim. The testimony upon the trial supported the theory that the same issue was litigated in the Nebraska case as in the one at bar. The question as to the loan or payment was not distinct from the issue of a sale or mortgage, but was directly connected with and constituted a part of it.

It is very evident that the principal question which was litigated upon the trial of the action in the Nebraska court was whether the transaction between Kountze and the defendant was a sale of the land to the defendant, or whether it was in fact a loan made by the defendant to the plaintiff, at his request, and for his benefit, under an agreement that the defendant should take a deed from Kountze and hold the land conveyed to him as merely a security for the moneys paid for the same, and which were to be repaid by the plaintiffs. If the defendant had purchased the land from Kountze only as an investment without any agreement that he was to convey the same to the plaintiff when the advances made were repaid by the plaintiff, then the plaintiff was not indebted to the defendant, and the moneys received by the defendant from the plaintiff were not installments paid upon the debt, but were loans as claimed by the plaintiff. If, on the contrary, the advances were made by the defendant, and the lands held as security for the same, then the moneys paid by the plaintiff to the defendant were partial payments, and the advances made were not loans. This was the real issue in the case and the judgment rendered thereon was conclusive between the parties. The fact that the defendant did not demand judgment against the plaintiff in that action, for the balance due him, does not change the

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issue which was tried, as the defendant had a right to set up his claim as a defense merely, as he clearly did, and not as a counter-claim. It being so used it cannot now be presented as a counter-claim against the plaintiff's demand in this action. To allow this to be done would be to permit the same issue to be presented as was tried and determined in the Nebraska action. The defendant, having had his day in court in the Nebraska case upon the issue there presented, cannot in this case be allowed to contest the same. The questions which were involved and decided in that action are *res adjudicata*, and must be regarded as settled and disposed of in accordance with the well-established principle of law, that where it appears that the identical questions involved in the issues have been tried and passed upon in another action, it is an estoppel which concludes the parties in the action on trial. (*Kerr v. Hays*, 35 N. Y. 331; *Wilder v. Case*, 16 Wend. 583; *Cromwell v. County of Sac*, 94 U. S. 351, 352.) The discussion already had fully disposes of the question presented. There is, however, another principle which may be invoked in support of the judgment which should not be overlooked. And that is that "The judgment is final and conclusive between the parties, not only as to the matters actually determined, but as to every other matter which the parties might have litigated and have decided as incident to, or essentially connected with, the subject-matter of the litigation within the purview of the original action, either as a matter of claim or of defense." (*Jordan v. Van Epps*, 85 N. Y. 436. See, also, *Smith v. Smith*, 79 id. 634; *Embury v. Conner*, 3 id. 511, 522; *Clemens v. Clemens*, 37 id. 59, 73; *Harris v. Harris*, 36 Barb. 88, 94.) After a careful consideration of the views presented in the argument of the learned counsel of the appellant, we are unable to discover why the rule last laid down is not applicable in the case at bar. Some other exceptions are taken to the rulings made upon the trial, but none of them are important, and they cannot affect the judgment if the views which we have expressed are correct.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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DANIEL M. PORTER, Appellant, v. ISIDOR WORMSER et al.,
Respondents.

An agent authorized to sell the property of his principal may, in the absence of special restrictions, sell in any usual and ordinary way.

Where a vendee brings an action to impeach the account of his vendor, on grounds which imply the existence of a formal contract of sale, he cannot question the validity of the contract under the statute of frauds.

In May, 1869, plaintiff contracted to purchase of defendants, who were stock-brokers and dealers in government bonds, \$1,000,000 United States four per cent bonds, which the latter agreed to carry for a specified time. Sale notes were delivered by defendants to plaintiff for the amount contracted for, and contemporaneously therewith entries were made of the sales, on defendants' books of sales of bonds; the bonds were described therein as coupon bonds. In June, 1869, plaintiff gave to defendants a "stop order" to sell "\$500,000 at 100.1-4, ex. July coupons and accrued interest \$500,000 do. at 100.1-3 do. do." The stop order authorized a sale at the market price whenever bonds were bought and sold by other parties at the price fixed. On August 18, bonds sold at the Stock Exchange at 101 "flat," i. e., carrying the accrued interest from July 1; thereupon defendants sold \$200,000 at that price on plaintiff's account; the accrued interest at that time was less than one-half per cent; next day bonds sold at 100.5-8, and defendants sold \$300,000 at 101 and 100.7-8, and on August 15 they sold \$500,000 at 100.7-8, the lowest price on that day. The losses on the transaction were charged in plaintiff's account. In an action to open and review the account, *held*, that the first limit of the stop order was reached and a sale was authorized after July 1, when bonds of the description of those in question had sold in the market for a flat price, which, after deducting therefrom the accrued interest from that date, would leave 100.1-3; that as the decline had not reached that point when the first sale was made it was unauthorized; but that plaintiff was only entitled to the damages; and, as it appeared that plaintiff was not injured by the sale, and that the stop-order limit was reached the next day, that he was entitled to nothing more than the proceeds of the sale.

The stop order contained no directions as to the manner of sale; the bonds were sold between the calls at the Stock Exchange at private sale; they were sold as high as, and some higher than the market price, and it appeared that the bulk of the sales of government bonds were made in this way. *Held*, that, in the absence of evidence to impeach the fairness of the sale, the manner in which it was made was not a ground of objection.

The headings to the notices of sale sent by defendants to plaintiff indicated that the bonds were bought of plaintiff by defendants; plaintiff

94	431
134	548
94	431
129	164
94	431
139	387
94	431
140	77
94	431
141	408

94	431
155	486

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claimed that defendants, as his agents, could not purchase, and so that the sales were void; defendants, however, proved that the sales were in fact made to others. *Held*, that defendants were not precluded by the notices from showing the real transactions.

It appeared by the notice of sale that the bonds sold August 13 were registered bonds. It was claimed by plaintiff here that this was not a sale of plaintiff's bonds, and furnished no basis for charging him with a loss. *Held*, that as this point was not raised by the pleadings, or by any exception appearing in the case, it was not available here.

Plaintiff's counsel also claimed the original contract of purchase to be void under the statute of frauds, as there was no written note or memorandum signed by him. This objection was not taken in the complaint, and was raised for the first time in the requests for findings. *Held*, that plaintiff was not in a position to question the validity of the contract under the statute.

(Argued December 12, 1883; decided January 15, 1884)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 3, 1882, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

George F. Comstock and D. M. Porter for appellant. When an agency is created or conferred by a written instrument, and grows wholly out of it, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be changed or enlarged by usage. (*Gardner v. Smith*, 6 Tenn. 591; *Hogg v. Snaith*, 1 Taunt. 347; *Potter v. Everett*, Ired. Eq. 152; *Baily v. Carswell*, 2 Johns. 48; *Martin v. Farnsworth*, 49 N. Y. 555; *Nixon v. Palmer*, 8 id. 398; *Bertram v. Godfrey*, 1 Knapp's P. C. C. 381; *Westcott v. Thompson*, 18 N. Y. 363; *Ledyard v. Hibbard*, 26 Alb. L. J. 414.) The question of the power of a stock-broker, buying on margins, to sell, if it depends upon the construction of writings between the parties, is a question of law merely. (*Davis v. Gwynne*, 57 N. Y. 676; 4 Daly, 218.) The bonds sold by defendants on August 13 and 14, 1879, were not plaintiff's bonds. This being

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so, their failure under their contract to deliver entitles the plaintiff to recover. (*Kimber v. Barber*, L. R., 8 Ch. App. 56; *Evans* on Ag. 14; *Beals v. Allen*, 18 Johns. 363; *Rossiter v. Rossiter*, 8 Wend. 495; *Allen v. Ogden*, 1 Wash. C. C. 274, 276.) The alleged sales of the bonds on August 13, 14, and 15, 1879, were no sales, because defendants sold the bonds to themselves. (*Salmon Mfg. Co. v. Goddard*, 14 How. [U. S.] 446-456; *Saunderson v. Jackson*, 2 B. & P. 238; *Thornton v. Meux*, M. & M. 43; *Higgins v. Senior*, 8 M. & W. 834; *Ind. P. & C. R. R. Co. v. Tyng*, 63 N. Y. 653, 655; *Benj. on Sales*, § 239; *Taussig v. Hart*, 49 N. Y. 301; 58 id. 425; *Pearson v. C. R. R. Co.*, 28 Alb. L. J. 366, 368-371; *Bain v. Brown*, 56 N. Y. 285, 288; *Gardner v. Ogden*, 22 id. 327, 343-349; *Brookman v. Rothschild*, 3 Simons, 153; *Rothschild v. Brookman*, 5 Bligh [N. S.], 165; *Whitackre v. Whitackre*, Macnaughton's Select Cases, 53, 45; *Crull v. Dodson*, id. 105, 114; *Bennett v. Austin*, 81 N. Y. 308, 333; *Robinson v. Mollett*, L. R., 7. L. H. Eng. & Ir. App. Cas. 802-808; *Ex parte Moore*, 45 L. T. [N. S.] 558; *Ex parte Dyster*, 1 Mer. 155, 175; *Thacker v. Hardy*, L. R., 4 Q. B. Div. 685; *Wardell v. U. P. R. R. Co.*, 103 U. S. 651; *Louther v. Louther*, 13 Vesey, Jr., 95, 103; *Langton v. Wait*, L. R., 6 Eq. 165; *Lincoln v. Erie Co.*, 132 Mass. 129; *Dutton v. Willner*, 52 N. Y. 312, 319; *Duden v. Waitsfelder*, 16 Hun, 337; *Story* on Bailment, § 319; *Day v. Holmes*, 103 Mass. 306; *Duane v. English*, L. R., 18 Eq. 524; *Martin v. Moulton*, 8 N. H. 504; 4 Kent's Com. [7th ed.] 475; *Schouler* on Bailments, 209; *Tyler* on Usury, 585; *Edw. on Bailments*, § 283; *B'k of N. O. v. Torry*, 7 Hill, 260; *S. C.*, 9 Paige, 649; *Dobson v. Racey*, 3 Sandf. Ch. 60; *Conkey v. Bond*, 36 N. Y. 427; 34 Barb. 276; *Fellows v. Northrup*, 39 N. Y. 117; 1 *Parsons* on Contracts, 87; *Bridenbecker v. Lowell*, 32 Barb. 9; *Gardner v. Ogden*, 22 N. Y. 327-341; *Abbott v. Am. Co.*, 33 Barb. 578; *Pickering v. Deweritt*, 100 Mass. 416; *McDonald v. Lord*, 2 Robt. 7; 26 How. Pr. 404; *Moore v. Moore*, 5 N. Y. 256; 4 Sandf. Ch. 37; *Marye v. Strouse*, 5 Fed. 483; *Bentley v. Craven*, 18 Beavan, 76; *Trevelyan v. Charles*, 9 id.

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140.) If the "stop-order" price had been reached, then at that moment defendants became plaintiff's brokers, and they could not purchase for themselves when employed to sell. (*Bain v. Brown*, 56 N. Y. 285, 288; *Gardner v. Ogden*, 22 id. 327, 343-349; *Brookman v. Rothschild*, 3 Simons, 153; *Robinson v. Mollett*, L. R., 7 H. L. Eng. & Ir. App. Cases, 802-808; *Thacker v. Hardy*, L. R., 4 Q. B. Div. 685; *Langton v. Waite*, L. R., 6 Eq. 165; *Copeland v. Insurance Co.*, 6 Pick. [Mass.] 198; *Reed v. Warner*, 5 Paige, 650; *Torry v. Bk. of N. O.*, 9 id. 648-663; *Lowther v. Lowther*, 13 Vesey, 95; Story's Eq. Jur., §§ 315, 321, 323; Story on Bailments, § 319; *Middlesex B'k v. Menot*, 4 Metc. 325; *The Bank v. D. R. R. Co.*, 8 Clarke [Iowa], 277; *Maryland Ins. Co. v. Dalrymple*, 25 Md. 242-265; *Sanderson v. Walker*, 13 Vesey, 601; *Langton v. Waite*, L. R., 6 Eq. 165; *Morse v. Royal*, 12 Vesey, 355; *Bain v. Brown*, 56 N. Y. 285, 288.) Defendants properly claim that the sales notes of May are conclusive as to the plaintiff, and that he could not offer parol evidence to vary them; that being true defendants cannot be allowed to offer evidence to vary these notes, rendered in August, much less can they impeach them without testimony. (*Mages v. Atkinson*, 2 M. & W. 439, 441; 2 Parsons on Contracts [5th ed.], 548; Benjamin on Sales, § 219; *Higgins v. Senior*, 8 M. & W. 834; *Williams v. Christie*, 4 Duer, 29; *Ind. P. & C. R. R. Co. v. Tynq*, 63 N. Y. 653, 655; Dos Passos on Stock-brokers, etc., 682; *Ford v. Williams*, 21 How. [U. S.] 287, 289.) No names being given of the purchasers other than the defendants, or of the place where the bonds were alleged to have been sold, or the numbers of the bonds, the transactions amount to nothing more than purported sales on paper. (Dos Passos on Stock-brokers, etc., 224, note 2, 682, 683; *Royal Exchange Ins. Co. v. More*, 11 Weekly Rep. 592.) The alleged sales were illegal, improper and unwarranted, because the bonds were not sold at public sale, or at public mart for such commodities, to-wit, the Stock Exchange, but were without any authorization therefor sold at private sale, whilst all the previous dealings of the parties had been made at the Stock Exchange.

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(*Brown v. Ward*, 3 Duer, 660; *Brass v. Worth*, 40 Barb. 648; *Wheeler v. Newbold*, 16 N. Y. 392; *Rankin v. McCullough*, 12 Barb. 103; *Willoughby v. Comstock*, 3 Hill, 389; *Dykers v. Allery*, 7 id. 497; *Ogden v. Lathrop*, 65 N. Y. 158; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242-265; *Costello v. City B'k*, 1 N. Y. Leg. Obs. 25; Edwards on Bailments, 283, notes 2, 3; *Rosenstock v. Forney*, 32 Md. 169.) Even if it was customary to make such sales outside the Stock Exchange, in the absence of express agreement, it would be illegal. (*Corn Exchange B'k v. Nassau B'k*, 91 N. Y. 74; *Robinson v. Mollett*, L. R., 7 H. L. Eng. and Ir. App. Cas. 802, 816; *Brown v. Ward*, 3 Duer, 660; *Costello v. City B'k*, 1 N. Y. Leg. Obs. 25; *Vermilye v. Adams' Ex. Co.*, 21 Wall. 138; *Shaw v. Spencer*, 100 Mass. 382; *Boardman v. Gaillard*, 1 Hun, 217; 60 N. Y. 614; *M. C. R. R. Co. v. Morgan*, 52 Barb. 217; *Walls v. Bailey*, 49 N. Y. 464, 471, 473; *Dickinson v. Gray*, 89 Mass. 29; *Duguid v. Edwards*, 50 Barb. 288; *Tilley v. County of Cook*, 13 Otto, 155, 162; *Nat. B'k v. Burkhardt*, 10 id. 686-692; *Bush v. Cole*, 28 N. Y. 261; *Delafield v. State of Illinois*, 26 Wend. 192, 221; *Gardner v. Bailey*, 6 Term R. 591; *Hogg v. Smith*, 1 Taunt. 349; *Potter v. Everett*, 2 Hall, 252; *Batty v. Carswell*, 2 Johns. 48; *Martin v. Farnsworth*, 49 N. Y. 555; *Nixon v. Palmer*, 8 id. 398; *Bertram v. Godfrey*, 1 Knapp's P. C. C. 381; *Commw. v. Cooper*, 130 Mass. 285; *S. C.*, 15 Am. Law. Rev. 360; *Haskins v. Warren*, 115 Mass. 536; *F. & M. B'k v. Logan*, 74 N. Y. 568, 572; *Diflock v. Blackburn*, 3 Camp. 43; *Gibson v. Crick*, 1 H. & C 142, 147; Wharton on Agency, § 244, note 1.) Where a party who was to perform a condition precedent by a certain time disables himself before that time from performing it, the other party may immediately abandon the contract. (Chitty on Contracts [6th Am ed.], 731, 732, 742; 2 Parsons on Contracts [6th ed.], 678.) Even if defendants had been brokers instead of being vendors, and had not imposed additional conditions on offering to repurchase, liability for selling without authority would not be barred by a subsequent offer to repurchase. (*Clark v. Meigs*, 10 Bosw. 337.) Plaintiff cannot be

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held to have ratified the alleged sales because he did not know at the time that defendants were the purchasers, or sold the wrong bonds or sold them at private sale. (*Levy v. Loeb*, 85 N. Y. 365; *S. C.*, 89 id. 386; Story on Agency, § 243.) The referee erroneously admitted evidence to explain the stop order. The language was plain, and the agreement must be learned from the contract. (*Davis v. Gwynne*, 57 N. Y. 676; *Westcott v. Thompson*, 18 id. 363; *Norton v. Woodruff*, 2 Comst. 153; *Canaday v. Krum*, 83 N. Y. 67; *Hill v. Hibernia Ins. Co.*, 10 Hun, 26; *Paine v. Howells*, 90 N. Y. 660; *Deyo v. Bleakley*, 24 Barb. 9; *Rogers v. Kneeland*, 13 Wend. 114; 10 id. 218.) The previous relations between the parties having been that of broker and customer, if while the account was still running plaintiff gave an order for the purchase of government bonds defendants could not sell their own bonds to plaintiff without a plain and explicit statement that this was what they were doing. (Story's Eq. Jur. [12th ed.], §§ 316, 311, 315, 316 a; *Kimberly v. Patchin*, 19 N. Y. 330, 332; Benjamin on Sales [3d Am. ed.], 317, § 352; *Cooks v. Mil-lard*, 65 N. Y. 352; *Foot v. Marsh*, 51 id. 288; *White v. Wilks*, 5 Taunt. 176; *Russell v. Carrington*, 42 N. Y. 118; *Conkey v. Bond*, 36 id. 427; *Robinson v. Mollett*, L. R., 7 Eng. & Ir. App. Cas. 802; *Proctor v. Brain*, 2 M. & P. 284; 3 C. & P. 536; *Clark v. Powell*, 1 N. & M. 492, 504; *Comstock v. Comstock*, 57 Barb. 453; *Brown v. Post*, 1 Hun, 303; 62 N. Y. 651; *Conkey v. Bond*, 36 id. 427; 34 Barb. 276; *Voris v. McCredy*, 16 How. Pr. 87; *Sinar v. Canaday*, 53 N. Y. 298; *Mitchell v. Read*, 61 id. 123; *Ross v. Ross*, 6 Hun, 80; *Burling v. King*, 46 How. Pr. 452; *Hoffman v. Treadwell*, 2 T. & C. 57; *Andrew v. Newcomb*, 32 N. Y. 417, 421; *Comfort v. Kiersted*, 26 Barb. 472; *Andrews v. Durant*, 11 N. Y. 35; *Whitcomb v. Hungerford*, 42 Barb. 117, 185.) As between principal and broker an arrangement that the broker is to carry the stocks or bonds which he is directed to buy, he himself furnishing their cost or a part of it, means that the broker may use the stocks for the purpose of borrowing on them the money needed to carry the loan.

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Nourse v. Prime, 4 Johns. Ch. 490, 491; 7 id. 81; *Stewart v. Drake*, 46 N. Y. 449; *Horton v. Morgan*, 19 id. 170; *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.) Where the parties are vendor and vendee there is, unless something further is added, no relation of agency, and there is no reason in the fact that the sale is on credit why the rule of law that property sold out of a common mass must be set apart and identified, should not be adhered to. (Benjamin on Sales, § 352; *Kimberly v. Patchin*, 19 N. Y. 330, 333, 340; *Cooke v. Millard*, 65 id. 352; *Bryan v. Baldwin*, 52 id. 232; *Gildersleeve v. Landon*, 73 id. 609; *Dykers v. Allen*, 7 Hill, 497.) The arrangement, though in form an executed sale, may be treated as an executory contract. (*Cooke v. Millard*, 65 N. Y. 352; 3 R. S. [6th ed.] 142, §§ 2, 3; *Justice v. Lang*, 42 N. Y. 493; *S. C.*, 52 id. 323; *Mason v. Decker*, 72 id. 595; Benjamin on Sales [3d Am. ed.], § 222, p. 198; § 211, p. 190; *Newberry v. Wall*, 65 N. Y. 484; *Hunter v. Wetsell*, 57 id. 375; *Wright v. Weeks*, 25 id. 153; *Ridgway v. Ingram*, 50 Ind. 145; *Pierce v. C. L. R.*, 9 Q. B. 210; *Boydell v. Drummond*, 11 East, 142; *Cooper v. Smith*, 15 id. 103; *Clinan v. Cook*, 1 S. & L. 22; *Calkins v. Falk*, 39 Barb. 621; *Dodge v. Lean*, 13 Johns. 508; *Whitman v. Meigs*, 4 Cush. 498; *Dilworth v. Bostwick*, 1 Sweeney, 581; *Sieverswright v. Archibald*, 17 A. & E. [N. S.] 104; 17 Q. B. 103; *Rollin v. Pickett*, 2 Hill, 352; *Marshall v. Lynn*, 6 M. & W. 109; *Bailey v. Ogdens*, 3 Johns. 419; *Caulkins v. Hellman*, 47 N. Y. 449.) If there is any contract as to the government bonds between the plaintiff and defendants under the statute of frauds the defendants could only change their position from vendors to that of agents, having the right to sell when the price reached the limit named in the stop order. (*Brookman v. Rothschild*, 3 Simon, 153; *Rothschild v. Brookman*, 5 Bligh [N. S.], 165, 195, 197; *Crull v. Dodson*, Mac. Sel. Cas. 114; *Whitackre v. Whitackre*, id. 45; 3 Simons, 153, 214, 218; *Gillett v. Peppercorne*, 3 Beav. 78; *Ex parte Moore*, 45 L. T. [N. S.] 558; *Pegram v. C. C. & A. R. R. Co.*, 84 N. C. 696; *Brunhild v. Freeman*, 77 id. 128; *Pendle-*

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ton v. Jones, 82 id. 249; Story on Agency, § 3211; *Ringo v. Binns*, 10 Peters, 269; *Bennett v. Austin*, 81 N. Y. 308; *Fulton v. Whitney*, 66 id. 548.) But if, for any reason, the case is taken out of the statute of frauds, the defendants cannot charge the plaintiff with the proceeds, because a sale to fix the damages on a refusal to deliver must be of the same goods which the vendor agreed to sell; there must be some proof equivalent to a tender of the specific bonds. (*Mason v. Decker*, 72 N. Y. 595; *Griesewood v. Blane*, 11 C. B. 326; *Yerkes v. Solomon*, 11 Hun, 471; *Levy v. Loeb*, 85 N. Y. 365; *S. C.*, 89 id. 386.) Plaintiff was entitled to have an accounting. (*Stenton v. Jerome*, 54 N. Y. 481; *Volkening v. DeGraaf*, 81 id. 268; *Wiggins v. Gaus*, 4 Sandf. 646; *Cook v. Jenkins*, 79 N. Y. 575; *Carr v. Thompson*, 87 id. 160; *Harrington v. Bruce*, 84 id. 103; *Sparman v. Keim*, 83 id. 245; *Byahie v. Wood*, 24 id. 607; *Conkey v. Bond*, 36 id. 427; *Tugman v. N. S. S. Co.*, 76 id. 207; *Conaughty v. Nichols*, 42 id. 83; *Knapp v. Roche*, 5 J. & S. 395, 404; 1 Daniel's Ch. Pr. and Pl. [4th Am. ed.] 856; *Palmer v. Palmer*, 13 How. Pr. 363; *Story v. Brown*, 4 Paige's Ch. 111; *Green v. Weaver*, 1 Sim. 404; *S. C.*, 6 L. J. C. 1; *Benedict v. Benedict*, 85 N. Y. 625; *Conaughty v. Nichols*, 42 id. 83; *Greentree v. Rosenstock*, 61 id. 583.) The sale was merely executory. (*Cooke v. Millard*, 65 N. Y. 352; *Foot v. Marsh*, 51 id. 288; Benjamin on Sales [3d Am. ed.], § 352; *White v. Wilks*, 5 Taunt. 176; *Gardiner v. Suydam*, 7 N. Y. 357-362.) When defendants reported to the plaintiff, under the "stop order," they defined unmistakably their relations with him as that of purchasers, in the form of the purchase-contracts, by which they are concluded. (*Thornton v. Meux, M. & M.* 43; *Higgins v. Senior*, 8 M. & W. 834; *I. P. & C. R. R. Co. v. Tyng*, 63 N. Y. 653, 655; *Magee v. Atkinson*, 2 M. & W. 439, 440; Benjamin on Sales, §§ 219, 239, 285, 286.)

John E. Parsons for respondents. If the action were for an account strictly, it was an entire defense that the defendants had accounted, unless the plaintiff could show that the

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account was inaccurate in respects and for reasons specified in the complaint. (*Weed v. Small*, 7 Paige, 573; *Leycroft v. Dempsey*, 15 Wend. 83; *Stoughton v. Lynch*, 2 Johns. Ch. 217; *Bruen v. Hove*, 2 Barb. 586; *Towsley v. Dennison*, 45 id. 490.) When fraud is alleged in a complaint, it must be proved, and proved as alleged. (*Degrav v. Elnore*, 50 N. Y. 1; *Ross v. Mator*, 51 id. 108; *Barnhard v. Seligman*, 54 id. 661; *Dudley v. Scranton*, 57 id. 424; *Barnes v. Quigley*, 59 id. 265.) The plaintiff's claim upon the reference, that the defendants as members of the syndicate received some benefit of interest from the government; that they did not inform Mr. Porter of this, and that for this reason the sale was fraudulent, is untenable. (*Marsh v. Falker*, 40 N. Y. 562; *Myer v. Amedon*, 45 id. 169; *Weed v. Case*, 55 Barb. 534; *Starr v. Bennett*, 5 Hill, 303; *Starr v. Peck*, 1 id. 270.) The contracts for the sale of the bonds cannot be impeached either for insufficiency or under the statute of frauds. (*Cozine v. Graham*, 2 Paige, 177; *Vanpelt v. Woodward*, 2 Sandf. Ch. 143, 144; 3 Parsons on Contracts, 389; *Spear v. Hart*, 3 Robt. 420; *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495; *Trevor v. Wood*, 36 N. Y. 307; *Gale v. Nixon*, 6 Cow. 445; *Towsley v. Dennison*, 45 Barb. 490; *Dows v. Durfee*, 10 id. 213; *Lockwood v. Thorne*, 11 N. Y. 170; *Philips v. Belden*, 2 Edw. Ch. 1; *Hodge v. Hoppock*, 75 N. Y. 491.) It was not necessary that the contract should specify either the denomination or the number of the bonds, or should state whether they were registered or coupon. (*Burdick v. Green*, 15 Johns. 247; *Putnam v. Lewis*, 8 id. 389; *Pequeno v. Taylor*, 38 Barb. 375; *East River B'k v. Butterworth*, 45 id. 476; *Tobey v. Barber*, 5 Johns. 68.) It being a part of the agreement of purchase that the defendants should carry the bonds, this permitted them to do what they chose, merely keeping themselves ready to deliver as the plaintiff directed, or to sell when directed. (*Horton v. Morgan*, 19 N. Y. 170; *Whitehouse v. Moore*, 13 Abb. Pr. 142; *Outwater v. Nelson*, 20 Barb. 29; *Hinton v. Locke*, 5 Hill, 439; *Stewart v. Drake*, 46 N. Y. 449; *Dykens v. Allen*, 7 Hill, 497; *Levy v. Loeb*, 15 J. & S. 61; 85 N.

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Y. 365, 370.) The defendants sold the bonds, as brokers for the plaintiff, and under the direction of the stop order, it was proper for them to make the sale at any usual place and in any usual manner. (*Goodenow v. Tyler*, 7 Mass. 36; *Clark v. Van Northwick*, 1 Pick. 343; *Van Allen v. Vanderpool*, 6 Johns. 69; *Douglas v. Leland*, 1 Wend. 490; *Brass v. Worth*, 40 Barb. 648; *Rankin v. McCullough*, 2 id. 103; *Brown v. Ward*, 3 Duer, 660.) If the bonds had been sold by the defendants before the stop-order price was reached, and if they themselves had been the purchasers, the plaintiff ratified the sale and cannot now object. (*Carnes v. Bleecker*, 12 Johns. 300; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Towle v. Stevenson*, 1 id. 110.) If the defendants made an improper sale of the bonds, it constituted a conversion of them, and for the damages sustained by the plaintiff they would be liable to him, but the plaintiff would not be relieved from the original purchase. (*Gruman v. Smith*, 81 N. Y. 25; *Baker v. Drake*, 53 id. 211.)

ANDREWS, J. This action is brought to open and review an account between the parties, commencing July, 1878, and ending August, 1879, of transactions in the purchase and sale of stocks and government bonds. The defendants were stock-brokers, and also dealers in government bonds on their own account. They purchased and sold upon the orders and for the account of the plaintiff from time to time during the period mentioned, stocks to a large amount, upon which the plaintiff realized a profit of \$30,000 or thereabouts, which was credited to him by the defendants in his account.

The particular transaction between the parties, which is the subject of controversy upon this appeal, originated in an executory agreement made on or about the 22d of May, 1879, for the purchase by the plaintiff of the defendants of \$1,000,000 United States four per cent bonds at the average price of about 103 $\frac{1}{8}$, and the sale of bonds to that amount by the defendants on account of the plaintiff on the 13th, 14th and 15th days of August, 1879, at an aggregate sum, which, after charg-

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ing interest on the purchase-price at the rate of three per cent per annum, and commissions on the sale, and crediting the July coupons, was \$24,637.55 less than the sum the plaintiff was to pay for the bonds under the agreement of May previous. This sum the defendants charged to the plaintiff in their account as the loss sustained by him in the transaction, and the right to charge this loss to the plaintiff is the only point now in controversy.

The written evidence of the contract for the purchase of the bonds is contained in several sale notes delivered by the defendants to the plaintiff, dated the 22d and 23d of May, 1879, commencing "Sold to D. M. Porter, Esq., by I. and S. Wormser," and specifying the amount of the bonds sold, the price, and stating that they were to be carried by the defendants for sixty days at three per cent interest per annum. Contemporaneously with the several transactions the cashier or book-keeper of the defendants entered in their book of sales of bonds a statement, under appropriate headings, of the name of the plaintiff as buyer, the dates, the amount, the description and the price. These entries followed an entry of a sale to another person, in which the bonds sold to him were described as "four per cent C

. B's," and the bonds sold to the plaintiff were described in the entry by the abbreviation "do." written under the preceding description. On June 20, 1879, just prior to the departure of the plaintiff for Europe, the defendants gave to the plaintiff a writing, by which they agreed to carry the bonds, if not sold at the expiration of the sixty days' arrangement, for "further thirty days" at three per cent interest per annum. The plaintiff in his complaint impeaches the item in the account of \$24,637.55 first, upon the ground of fraud of the defendants, actual and constructive, in the origin of the transaction, by reason of which the plaintiff alleged, he was entitled to, and did, immediately on learning the facts, on the 6th day of September, 1879, rescind the contract of purchase; and second, that the sale of the bonds on his account on the 13th, 14th and 15th days of August, 1879, was unauthorized and constituted a breach of the defendants' agree-

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ment to carry the bonds for ninety days, which time did not expire until August 21, 1879. There is no suggestion in the complaint of any objection to the charge in question, except upon the grounds just stated.

The plaintiff failed on the trial to prove the fraud alleged in the complaint. The evidence shows that the transaction was, in its origin, an executory agreement by the defendants, as vendors, to sell to the plaintiff, as vendee, \$1,000,000 of government bonds at the prices mentioned in the sale notes, and to carry them for the time and at the rate of interest specified. The allegations of fraud were not only unproved, but were disproved, and the first ground alleged in the complaint for impeaching the account may be dismissed without further consideration.

Upon the facts hitherto stated, the sale of the bonds on the 13th, 14th and 15th days of August, 1879, was unauthorized, and furnished no foundation for charging the plaintiff with the difference between the purchase-price of the bonds and the amount for which they were sold. The plaintiff at the time of the sale was not in default. The contract to carry had not expired, and the sale cannot be regarded as the exercise by a vendor of personal property of a right to resell on account of the vendee, and to charge the latter for the loss, for the plain reason that such right in any given case does not come into existence, and can be exercised only after default by the vendee. (See *Dustan v. McAndrew*, 44 N. Y. 72; *Mason v. Decker*, 72 id. 595; 28 Am. Rep. 190.) If, therefore, there were no facts in the case except as so far stated, it would follow that the item of \$24,637.55 should be expunged from the account. But the defendants rely for their authority for the sale of the bonds prior to the expiration of the time for which they were to be carried, and before the plaintiff was in default, upon a "stop order," so called, given by the plaintiff on the 20th of June, 1869. This was an order, in writing, directing the defendants to sell for account of the plaintiff and at his risk "\$500,000 United States four per cent bonds at 103, ex. July coupons and accrued interest; \$500,000 do. at 103½

do. do.; or at your (their) discretion, 'stop order,' \$500,000 United States four per cent bond at 100 $\frac{1}{2}$, ex. July coupons and accrued interest; \$500,000 do. at 100 $\frac{1}{2}$ do. do." The construction of this order presents one of the principal questions in the case. When this order was given, the contract made in May for the purchase and sale of the bonds had not matured and was still in full force. The market price of government bonds had declined, and the plaintiff was about leaving New York, where he resided, for Europe. He procured the extension of the time for which the defendants were to carry the bonds, as before stated, and concurrently therewith gave the "stop order" in question. It is not controverted that the order related to the same bonds which the plaintiff had previously contracted to purchase.

The definition of a "stop order" was given by Nathan, one of the defendants, in his evidence on the trial and was not controverted. He said, "the meaning of a 'stop order' is to await a certain figure, and whenever this figure is reached, to stop the transaction by then selling or buying, as the case may be, as well as possible," and was explained by another witness as follows, "for instance, if you give a stop order at 109 or 110, you must sell as soon as the stock or bonds have sold at that price by some one else. If you can sell at that price you must do it, but if you cannot, you must sell at whatever the price is after they have sold at that price." The market price of government bonds continued to decline after June 20, and on the 13th of August they sold at the Stock Exchange for 101. This was the flat price, carrying the accrued interest from July 1, when the last due coupons were payable. The defendants thereupon on the same day, acting upon the assumption that the "stop-order" price for \$500,000 of the bonds, viz.: "100 $\frac{1}{2}$ ex. July coupons and accrued interest," had been reached, sold \$200,000 of bonds on account of the plaintiff at 101. The next day (Aug. 14), government bonds sold at the Exchange for 100 $\frac{1}{2}$, and the defendants on the same day sold \$300,000 of bonds on account of the plaintiff at 101 and 100 $\frac{1}{2}$. On the 15th of August they sold the remaining \$500,000 at

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100 $\frac{1}{4}$, which was the lowest market price of the day. The defendants construed the "stop order" as requiring them to sell when the market price of the bonds should decline to 101 $\frac{1}{4}$ or 101 $\frac{1}{4}$ without the July coupons, or if sold after July 1, when the market price should equal 100 $\frac{1}{4}$ and 100 $\frac{1}{4}$ plus the accrued interest from that date. The plaintiff on the other hand insists that the "stop-order" price referred to the flat price, and that the words "ex. July coupons and accrued interest," mean "without taking the July coupons and the accrued interest into consideration in fixing the price; that is when the bonds were selling for 100 $\frac{1}{4}$ (or 100 $\frac{1}{4}$) flat, as it is called."

It is apparent that the authority of the defendants to sell the bonds under the "stop order" did not become operative until either the upper or the lower limits fixed therein were reached in the market, and that it did not authorize a sale at any intermediate price. The latter proposition, however, is subject to the qualification resulting from the technical meaning of the words "stop order," as explained on the trial, that after a sale of similar bonds in the market in a transaction between third persons at the "stop-order" price, the power to sell under the "stop order" would immediately attach, and the defendants might then proceed to sell the bonds at such price as could be obtained, either above or below the price limited. It seems to be a decisive reason for rejecting the construction of the "stop order" insisted upon by the plaintiff, viz.: that the bonds were to be sold when they declined to 100 $\frac{1}{4}$ and 100 $\frac{1}{4}$, or in other words, that the flat price was intended, that such construction deprives the qualifying words "ex. July coupons and accrued interest" of any significance. A direction to sell at 100 $\frac{1}{4}$ or 100 $\frac{1}{4}$, without more, would have expressed the exact meaning which the plaintiff attributes to the whole phrase "100 $\frac{1}{4}$ or 100 $\frac{1}{4}$ ex. July coupons and accrued interest." It is not we think difficult to understand the general purpose of the plaintiff in adding the words "ex. July coupons and accrued interest" to the price named in the order. This purpose plainly was to qualify the limit of 100 $\frac{1}{4}$ or 100 $\frac{1}{4}$, so that the power of sale should not become operative until the bonds should sell for

these prices without the July coupons and without the accrued interest, or in other words, not until they had fallen to $100\frac{1}{4}$ and $100\frac{1}{4}$, the seller reserving the July coupons and the accrued interest. A sale of bonds "ex. July coupons," means a sale reserving the coupons, that is, a sale in which the seller receives in addition to the purchase-price, the benefit of the coupons, which benefit he may realize either by detaching them or receiving from the buyer an equivalent consideration. In this case the bonds not having been sold until after July 1, the plaintiff presumably had the benefit of the coupons falling due on that day, and they were credited to him in his account. A sale at $100\frac{1}{4}$ or $100\frac{1}{4}$ with the accrued interest added is precisely equivalent to a sale at $100\frac{1}{4}$ or $100\frac{1}{4}$, the seller reserving the accrued interest. In the one case the seller would receive the accrued interest as a part of the price of the bonds, and in the other he would retain an interest in the bonds, and the transaction would ordinarily be adjusted either by the seller cutting off the current coupon and retaining thereout the amount of interest accrued at the time of the sale, or the buyer, on delivery of the bonds, would pay the seller an equivalent amount in addition to the purchase-price. We think the first descending limit of the "stop order" was reached when government bonds of the description embraced in the contract, had sold in the market for a flat price, which after deducting therefrom the accrued interest, would leave $100\frac{1}{4}$.

The further point is taken by the plaintiff, that the limit of the "stop order" had not been reached August 13th, when the first sale of \$200,000 of bonds was made, assuming the defendants' construction of the order to be the correct one. The lowest price for which government bonds sold on that day, according to the evidence, was 101. The highest of the descending limits in the "stop order" was $100\frac{1}{4}$ and accrued interest from July 1st. The accrued interest on government bonds from July 1st to August 13th (the day of the sale) was a very little less than one-half of one per cent, and by this difference the limit had not been reached. The question therefore arises as to the effect of this transaction upon the rights of the parties.

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It is important to bear in mind the relation in which the parties stood to each other at this time and the capacity in which the defendants were acting in making the sale. The defendants were vendors of the bonds. But in executing the authority conferred by the "stop order" they were agents of the plaintiff. They had no right to sell the bonds as vendors, until some default had occurred on the part of the plaintiff, but in selling the bonds they did not assume to act by virtue of any right as vendors, but only as agents under the "stop order." The sale when fully completed, in accordance with the order, would necessarily determine the state of the account between the parties, and show the loss or profit on the transaction. But this does not alter the fact, that in making the sale the defendants assumed to act as agents of the plaintiff under the "stop order," and not as vendors or owners of the bonds. It is the case then of an agent authorized to sell property for his principal, making a sale not strictly within his authority. Such a transaction gives the principal a right of action against the agent for any damages sustained by the former from the agent's act. But if no damages have resulted nothing can be recovered, because both wrong and damage must occur to sustain the action. In this case not only were no damages shown, but on the contrary it affirmatively appears that the plaintiff was not injured by the sale on the 13th. On the next day (the 14th) government bonds declined in the market to 100 $\frac{1}{2}$ and the "stop order" limit was then reached, which entitled the defendants to sell the whole \$1,000,000 of bonds, and they then proceeded to sell on the 14th and 15th of August the remaining \$800,000. In *Gruman v. Smith* (81 N. Y. 25), which was an action by a broker to recover an alleged balance on a stock transaction, ascertained by a sale of stock without notice to the customer, it was held that the plaintiff was entitled to recover such balance, subject to a counter-claim for any damages resulting to the defendants from the unauthorized and irregular sale, but that the customer could claim no greater benefit than would

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have accrued to him if the sale had not been made. (See also *Capron v. Thompson*, 86 N. Y. 418; Story on Agency, §§ 222, 236.)

It is further claimed that the sale of the bonds should have been made at the Stock Exchange, whereas they were sold between the calls at private sale. It is not claimed that they were sold under the market price. On the contrary they were sold at as high, and some of them at a higher price than similar bonds brought at public sale on the 14th and 15th. The "stop order" contained no direction as to the manner of sale, and an agent authorized to sell the property of his principal, may, in the absence of special restrictions, sell in any usual or ordinary way. It was shown that the bulk of sales of government bonds were made outside of the public board, at private sale, and nothing having been shown to impeach the fairness of the sale in question, the fact that it was a private and not a public sale was not a ground of objection. (See *Pollen v. Le Roy*, 30 N. Y. 549; *Crooks v. Moore*, 1 Sandf. 297; *White v. Kearney*, 2 La. Ann. 639.)

It is claimed, however, that the defendants were themselves the purchasers of the bonds, and that the transaction was void for that reason. The principle is undeniable that an agent to sell cannot sell to himself, for the obvious reason that the two relations of agent and purchaser are inconsistent, and such a transaction will be set aside without proof of fraud. The claim that the defendants purchased the bonds themselves, is based upon certain notices in writing, sent by the defendants to the plaintiff, of the several alleged sales, headed "Bought of D. M. Porter, Esq., by I. and S. Wormser," containing a statement of the particular amount of bonds sold and the price and accompanied in each instance except one, by a letter signed by the defendants, referring to the notice inclosed. The defendant Nathan testified that the bonds were sold by the defendants, between the calls, at the offices of the different dealers in government bonds, and there is no evidence to the contrary, except the notices referred to, which the witness said, in answer to a general question, represented the transaction therein referred to. It is insisted that these notices, which the counsel characterizes

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as "purchase notes," conclusively determine the point that the defendants were the purchasers of the bonds, and that parol evidence was inadmissible to show that they sustained any other relation to the transaction, or that in fact the bonds were sold to third persons. We think the defendants were not precluded from showing the real transaction, and that the rule that parol evidence is inadmissible to change or vary written contracts has no application. The notices were simply reports by an agent to his principal of his proceedings in the execution of the agency. The plaintiff impeaches the agent's transaction, because upon the face of the reports the agent appears to have undertaken to execute an agency to sell, by selling to himself. It was, we think, admissible for the defendants to show the actual transaction, and that by mistake or inadvertence it was misrepresented in the written advices. The plaintiff was not prejudiced by the mistake, and the proof simply relieved the defendants from the charge of misconduct in executing the authority intrusted to them.

But the plaintiff raised on the argument another question which, if it had been properly raised on the trial, would not be free from difficulty. It is now claimed that the original transaction in May, 1879, was the purchase and sale of coupon, as distinguished from registered bonds, and that the sale made by the defendants of \$200,000 of bonds, August 13th, on account of the plaintiff, was of registered bonds, and that at least a portion of the bonds subsequently sold were of the same character. The sale of registered bonds it is insisted was not a sale of the same kind of bonds which the plaintiff bought of the defendants, or which they were by the "stop order" authorized to sell, and that the order, therefore, has never been executed, and that, except on the basis of such execution, no loss can be charged to the plaintiff. In respect to the character of bonds, contemplated in the original agreement of purchase, whether registered or coupon, the oral negotiation and the sale notes, gave no intimation. The evidence is that there was no specification of the particular kind of bonds in the oral negotiation, but simply an agreement of the plaintiff to buy, and

of the defendant to sell \$1,000,000 four per cent government bonds, and the sale notes described them with no greater particularity. It was probably not at the time deemed material to which of the two descriptions of bonds the contract related. The evidence is that registered and coupon bonds have the same market value, and the reports of sales at the Stock Exchange, introduced in evidence, while they show fluctuations in the price of the same description of bonds on the same day, and also that registered bonds sometimes sold higher and sometimes lower than coupon bonds, they do not contradict the oral evidence. The defendants, however, entered the transaction in their books as we have stated, and in their account credited the plaintiff with the July coupons, and the plaintiff in the "stop order" refers to the bonds as coupon bonds.

There is force in the claim that the contract of purchase, although indefinite when made, was made definite by the subsequent acts of the parties. The only evidence in respect to the character of bonds sold under the "stop order" is contained in the advice of the sale of \$200,000 of the bonds on the 13th of August, in which they are described as registered bonds, and which concludes, "shall endeavor to sell remaining 300 M." The other advices refer to bonds sold without specification, whether registered or coupon. Upon these facts the court is asked to reverse the judgment on the ground that a sale of registered bonds was not a sale of the plaintiff's bonds and furnishes no basis for charging him with any loss in the transaction. But this point was not raised by the pleadings or by any exception, nor so far as it appears was it suggested until the argument of the appeal. The plaintiff, before the action was commenced, had knowledge of all the facts bearing upon this question. He sets out in his complaint the particular grounds of objection to the account, but gives no hint of the objection now taken. He was silent upon this point during the progress of the trial. He made no requests for findings designed or calculated to raise this question. His requests for findings in respect of transac-

tions subsequent to the original purchase were made with exclusive reference to the claim put forth in his proposed conclusions of law that the August sales were void, *first*, because they were not made at the price or prices limited in the "stop order;" *second*, because not made at the Stock Exchange; and *third*, because the defendants were the purchasers, or, having so represented themselves, were estopped from alleging to the contrary. Under these circumstances we are of opinion that the plaintiff is not in a situation to raise the point now suggested.

The plaintiff further insists that the original contract of purchase was void by the statute of frauds, there being no note or memorandum of the contract signed by him. This ground was not taken in the complaint, and was raised for the first time in the requests for findings. The complaint in substance alleges the existence of a contract for the purchase of the bonds, and seeks to avoid the loss charged thereon on the ground of fraud in the inception of the contract, and because the sale under the "stop order" was made in disregard of the price limited therein. The general rule is that the defense of the statute of frauds must be pleaded, except where the complaint on its face discloses a case within the statute. It cannot be doubted that if the defendants had brought an action to recover a balance claimed to be due on the contract for the purchase of the bonds without disclosing whether the contract was oral or written, the plaintiff would have been bound to plead the statute to avail himself of its protection. The plaintiff having become an actor, and brought an action to impeach the account on grounds which implied the existence of a formal contract, is not in a position to question the validity of the contract under the statute. (See *Cozine v. Graham*, 2 Paige, 177; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; 2 Story's Eq., § 755.)

This conclusion renders it unnecessary to determine whether the various writings put in evidence are sufficient to satisfy the requirements of the statute, and constitute a note or memorandum of the contract signed by the purchaser.

These are the principal questions in the case. We find no

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error in the record, and the judgment should therefore be affirmed.

All concur.

Judgment affirmed.

THE PEOPLE, ex rel. KEECH, Appellant, v. HUBERT O. THOMPSON, Commissioner, etc., Respondent.

94	451
126	183
94	451
166	48
166	49

Under the limitation in the provision of the charter of the city of New York (§ 28, chap. 835, Laws of 1873), authorizing the heads of departments to remove subordinates in their departments, which prohibits the removal of a regular clerk or head of a bureau "until he has been informed of the cause of the proposed removal and has been allowed an opportunity for explanation," the power of removal may not be exercised unless some cause exists, such as neglect of duty, incapacity, or unfitness for the position.

Where, however, a statement of charges with a specification of facts furnishing a sufficient cause for removal, and sufficiently distinct to apprise the subordinate of the grounds upon which the charges are based, with notice of a time and place when an opportunity for an explanation will be given, is served upon him; and where, at the time and place specified, an opportunity for explanation is given, the requirements of the statute are met; it is not requisite that the charges and specifications should be drawn with the formal exactness of pleadings in a court of justice; nor is the subordinate entitled to a regular trial. The head of the department, if the explanations are not satisfactory to him, may, in his discretion, remove, without calling witnesses to substantiate the charges, or allowing testimony on the part of the subordinate; he may exercise the power upon facts within his own knowledge or based upon information received from others.

The distinction between said provision and that giving to the mayor the power to remove heads of departments (§ 25) pointed out.

People, ex rel. Sims, v. Board of Fire Comm'rs (73 N. Y. 440), *People, ex rel. Munday, v. Board of Fire Comm'rs* (72 id. 445), *People, ex rel. Campbell, v. Campbell* (82 id. 247), *People, ex rel. Mayor, etc., v. Nichols* (79 id. 588), distinguished.

The relator, who was superintendent of repairs and supplies in the department of public works, was served with a communication charging him, among other things, with neglect and inaction in the matter of fitting up two armories. By way of answer, the relator denied that such work came under his supervision and alleged that he was not responsible for the neglect. Held that, conceding relator was entitled to a trial when the charges were denied, this answer was in the nature of a demurrer.

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and so admitted the facts charged; and, as the armories were clearly under his charge (§ 72, sub. 7), and he responsible for the neglect, there was sufficient ground for removal, and so no necessity for a trial on the other charges.

The question as to the reasonableness of the time allowed for explanation rests to a great extent in the discretion of the head of the department; and where it does not appear that the discretion has been abused, a refusal to give further time furnishes no ground for a reversal of his decision.

(Argued December 14, 1883; decided January 15, 1884.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made January 25, 1882, affirming the determination of respondent as commissioner of public works in the city of New York, in removing the relator from the office of superintendent of the bureau of repairs and supplies in said department. (Reported below, 26 Hun, 28.)

The proceedings of the commissioner were brought up for review by *certiorari*.

It appears by the return that on the 11th of April, 1881, the commissioner addressed to the relator the following letter:

“ DEPARTMENT OF PUBLIC WORKS,
COMMISSIONER'S OFFICE, No. 31 CHAMBERS STREET, }
NEW YORK, April 11, 1881. }

“ To Mr. THOMAS KEECH:

“ SIR — Since our recent conversation, when I had occasion to complain of the manner in which the duties of your bureau are discharged, I have concluded to ask a full and formal explanation of the matters talked about by us.

“ You are, therefore, notified that you will be allowed an opportunity at this office, at 12 o'clock, noon, of the 14th inst. (Thursday), of making an explanation of such matters, and, unless satisfactory, I shall remove you from the office of superintendent of repairs and supplies.

“ After a very careful examination into the affairs of your bureau, I have become fully convinced that you have not performed the duties of your office with the requisite promptitude, intelligence and efficiency.

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“The following are some of the facts and circumstances which have led me to this conviction and conclusion :

“In the final estimate for the year 1881, special appropriations were made, as requested in the departmental estimate, for ‘fitting up Fifth regiment armory, Essex market, \$18,000,’ and for ‘fitting up Sixty-ninth regiment armory, Tompkins market, \$15,000.’ It was your duty to report to me plans or measures toward the execution of these necessary works which came under the charge and supervision of your bureau, especially since officers of the regiments repeatedly urged upon you the necessity of fitting up the armories as speedily as possible, and you were informed of the fact that the Fifth regiment will have to vacate its present quarters and move into the armory over Essex market on the first of May next. Yet, for a period of more than three months since the appropriations were made, you have failed to report or even suggest to me any thing whatever in connection with these works, or to make any preparation or report as to their execution, and officers of the Fifth regiment have finally complained to me of your inattention and inaction in this matter.

“In the matter of placing an elevator in the brown stone court-house, for which provision was made in the departmental and final estimates for 1881, you have shown the same want of attention.

“It is one of your duties to furnish to the head of the department estimates of the cost of any work to be done, or supplies to be furnished through your bureau, to enable him to make a proper apportionment of the moneys appropriated among the various works, and supplies required, according to their necessity. But your estimates have been so flagrantly incorrect that they cannot be taken as an indication even of the ultimate cost of the respective works or supplies.

“A large proportion of the bills or vouchers for work done and supplies furnished has been unnecessarily and unreasonably delayed in your bureau. I have submitted to a great deal of annoyance by reason of complaints from tradesmen and persons dealing with the city, of the delays attending the approval of

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bills passing through your bureau, and I finally came to the conclusion, after mature deliberation, to adopt a rule, which, in my judgment, gives adequate time for the necessary examination and work. It is, of course, annoying to the head of department to be dunned about bills against the department, and I have determined to relieve myself from this annoyance in the future. To that end, I issued the circular letter requiring the transmission of all bills for work, supplies or services from the respective bureaus within seven days after the receipt of the same. In your letter to me of the 31st ult., in reference to that circular, you say that it is not possible to make proper examination as to bills in your bureau within that time. You thereby state your inability or unwillingness to do that which, in my opinion, an intelligent, diligent and well-disposed officer in your position could readily do, and to discharge the duties of your office with that promptitude which the public interest requires.

“ You have allowed some of the work under your supervision to be performed in a very dilatory manner to the great inconvenience of public officers, and after repeated requests by me, personally and through my deputy, that these works be more promptly executed.

“ In your letter to me of the 4th instant, you say that the business of your bureau is suffering very much for want of efficient clerical help, and that for the last two months the only clerical work done was to voucher bills. You thereby acknowledge that you allowed such state of things to exist for two months without reporting it to me, to enable me to correct it if necessary.

“ Very respectfully,
(Signed) HUBERT O. THOMPSON,
Commissioner of Public Works.”

At the time and place assigned the relator appeared in person, accompanied by counsel, and presented an answer or explanation as follows :

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" NEW YORK, April 14, 1881.

" TO HUBERT O. THOMPSON, *Commissioner of Public Works* :

" SIR — I am in receipt of your favor of April 11, 1881, containing certain charges against me relating to the conduct of my office of superintendent of supplies in the department of public works of the city of New York.

" With reference to said charges, and any others which you desire to make, I wish to say :

" *First.* — That I shall be ready at any time and place which you may designate to controvert or satisfactorily explain the same, provided lawful evidence be produced by you of the foundation of said charges against me, and a sufficient opportunity be given me of explaining or disproving them.

" *Second.* — I deny your right to remove me as superintendent aforesaid until I shall have been specifically and lawfully informed of each and every cause of the proposed removal, and am allowed an opportunity of making such explanation as I may be advised I am justly entitled to.

" *Third.* — With reference to the charge contained in your said letter of the 11th, relating to the 'fitting up of the Fifth and Sixty-ninth regiment armories,' I desire to say that the charge and supervision of the work to be done, and supplies to be furnished in this matter, did not come under my bureau or control, and is not, up to this date, under my control, or under the charge and supervision of my bureau, and I deny that I am in any sense responsible for the delays or inattention complained of by you in the premises.

" *Fourth.* — As to the matter of placing an elevator in the brown stone court-house, which came under the charge and supervision of my bureau, I desire to say that when the appropriation therefor was passed to the credit of my bureau, I at once took the necessary steps to carry out the work ; but by the direction of the acting commissioner, and in consequence of his acts, and not of mine, in the premises, the carrying out of the work has been delayed up to this time — of all of which you had due notice.

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"*Fifth.* — I deny that my estimates on work to be done for the department have been so flagrantly incorrect that they could not be taken as an indication of the ultimate cost of the respective works or supplies, and I deny that bills or vouchers for said work done, and supplies furnished, have been unnecessarily and unreasonably delayed in my bureau; and also that in any instance I have refrained from transmitting to you bills for work and supplies, or services, within seven days after the receipt of them, except in a very few cases where a proper and accurate examination and report thereon could not be made within that time, and of which, whenever occurring, I informed you.

"*Sixth.* — I deny that I have allowed any portion of the work under my supervision to be performed in a dilatory manner, to the great inconvenience of public officers, and I demand that you produce lawful evidence of specific times and places where such acts as you allege occurred.

"*Seventh.* — I desire to state further that all delays which may have occurred for some time past in the business of my bureau are due to the fact that all the clerical force in my office is, and has been for some time past, very inefficient, and was originally placed there without consultation with me, and without my knowledge, and was removed in the same manner, and of this inefficiency you have been from time to time notified by me.

"*Eighth.* — I assert that at all times since I have held this office (now six years), I have performed its duties honestly, and with that degree of intelligence which the position requires, and I further assert that any delay in business, unskillful work, or any other matters in my bureau, which may have been complained of, were not due to my conduct, but to others, over whom you did not permit me to have sufficient control to regulate the speed and quality of the work performed.

"*Ninth.* — I respectfully urge my right and request:

"1. That each and every charge which you desire to make be reduced to writing, and be definitely and specifically framed, and that lawful evidence be produced to sustain each of them.

"2. That I be allowed to answer each charge in writing, and

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to produce lawful testimony to controvert or explain the same ; and

“ 3. That I may be represented by counsel in the hearing and conduct of any investigation which may be made by you in the premises.

“ Yours very respectfully,

(Signed) THOMAS KEECH.”

A colloquy then took place between the commissioner and the counsel, which is set forth at length in the return, the substance of which is that the relator reiterated his claim to the right to take testimony as to any defense or explanation which he might have to make to either or any of the charges, and insisted that before the commissioner could remove him, he (the commissioner) must produce oral or other testimony to substantiate any charge which he had made or desired to make, and that the answer, in writing, was a sufficient explanation of the charges in the commissioner's letter, so far as they were specific and definite enough to be answered. The commissioner declared his readiness to hear any thing that the relator wished to say in addition to his written answer, but refused to postpone the hearing for that purpose, and insisted that his letter of the 11th day of April was a sufficiently definite and specific statement of the charges. The commissioner, after hearing whatever was alleged or claimed by the relator's counsel, adjudged that the charges of his letter were not satisfactorily explained, and made an order removing him.

— *DeB. Wilmot* for appellant. An appeal lies from the order of the General Term, dismissing the writ of *certiorari*. (*People, ex rel. Campbell, v. Campbell*, 82 N. Y. 247 ; *People, ex rel. Clapp, v. B'd of Police*, 72 id. 415 ; *People, ex rel. Citizens' Gas-Light Co., v. B'd of Assessors*, 39 id. 88.) The appellant could only be removed for cause, and then only after a reasonable opportunity of being heard. (*People, ex rel. Campbell, v. Campbell*, 82 N. Y. 247 ; *People, ex rel. Sims, v. B'd of Fire Comm'rs*, 73 id. 440 ; *People, ex rel. Munday, v. Board of Fire Comm'rs*, 72 id.

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445; *People, ex rel. Mayor, v. Nichols*, 79 id. 588.) The court can examine into the record and see whether the respondent has exercised his authority in the mode prescribed by law and whether there was any rule of law violated to the prejudice of the appellant in the proceedings upon his removal. (*People, ex rel. Cook, v. B'd of Police*, 39 N. Y. 517; *People, ex rel. Haines, v. Smith*, 45 id. 772; *People, ex rel. Hart, v. B'd of Fire Comm'rs*, 82 id. 360; Code of Civil Procedure, § 2140, subds. 2, 3; Dillon on Municipal Corporations, §§ 192-193; *Murdock v. Phillips Academy*, 12 Pick. 244; 2 Burn's Ecc. Law, 145; *Page v. Hardin*, 8 B. Monroe, 648; *Rex v. A. Steward, etc.*, 8 D. & E. 352; *Osgood v. N. L. R.*, 5 E. & I. App. H. of L. 636; Wilcox on Municipal Corporations, 702; *Baggs' Case*, 11 Rep. 93, 99, Lord Coke's Notes; *People, ex rel. Nichols, v. Mayor, etc.*, 79 N. Y. 588; *People, ex rel. Wilbur, v. Eddy*, 57 Barb. 598; Potter's Dwarria on Statutes, 186-187; *Hart v. Cleis*, 8 Johns. 44; *Donaldson v. Wood*, 22 Wend. 395; Potter's Dwarria, 49.) The appellant should have been allowed a reasonable time and opportunity to produce evidence or proof by way of explanation of the charges made. (*In re Emmet*, 65 How. 266; Cushing on "Law and Practice of Legislative Assemblies," "Hearing Parties," 406-7.) This case comes under the provisions of the Code of Civil Procedure. (Code of Civil Procedure, § 2140, subds. 4, 5; *People, ex rel. Murphy, v. French et al.*, 92 N. Y. 306.) Under the provisions of the statutes in force at the time the charter was enacted, and also under the provisions of the Code of Civil Procedure, the respondent had ample power to procure the attendance of witnesses and to administer oaths. (Laws of 1843, p. 37; Code of Civil Procedure, §§ 854, 855, 856.)

D. J. Dean for respondent. The method of the relator's removal by the commissioner of public works is in accord with the provisions of the charter. (Laws of 1873, chap. 335, p. 503, § 72, subd. 7; *People, ex rel. Folk, v. Police B'd*, 69 N. Y. 409.) The statute does not require proof of cause to be made as the condition of the right to remove. (*People, ex rel.*

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Munday, v. *B'd of Fire Comm'rs*, 72 N. Y. 449; Laws of 1873, chap. 335, §§ 41, 77; *People*, ex rel. *Mayor*, v. *Nichols*, 79 N. Y. 582; Laws of 1870, chap. 137, § 29; Laws of 1857, chap. 446, §§ 20, 21; Laws of 1870, chap. 137, § 32.) It is not necessary that the court should agree with the commissioner upon the propriety of his judgment. (*People* v. *B'd of Police*, 69 N. Y. 409; 82 id. 361; *Munday* v. *Fire Comm'rs*, 72 id. 449.)

MILLER, J. The relator was removed by the commissioner of public works in the city of New York from the office of superintendent of repairs and supplies in the department of public works, and the question upon this appeal is, whether the course pursued by the commissioner in making the removal was in accordance with the provisions of the charter and sanctioned thereby. The authority to remove the relator from the office which he held is conferred by the provisions of the charter of the city. (Laws of 1873, chap. 335, § 28.) The section in question reads as follows: "The heads of all departments (except as herein otherwise specifically provided) shall have power to appoint and remove all chiefs of bureaus (except the chamberlain), as also all clerks, officers, employees and subordinates in their respective departments, except as herein otherwise specially provided, without reference to the tenure of office of any existing appointee. But no regular clerk or head of bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity for explanation, and in every case of removal the true grounds thereof shall be forthwith entered upon the records of the department." It will be noticed that preliminary to removal the commissioner is required to inform the officer of the cause of the proposed removal, and to allow him an opportunity for explanation. Until these conditions are complied with the power of removal is not vested in the commissioner and no action can be taken by him. The power does not rest in his volition alone, and unless some cause exists, such as a neglect of duty, a want of capacity, or some act or

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conduct which evinces an unfitness for the position filled by the officer, the commissioner cannot lawfully remove him. (*People, ex rel. Munday, v. Board of Fire Comm'rs*, 72 N. Y. 445.) The record in this case shows that a communication was served on the relator on the 13th day of April, 1881, signed by the commissioner, in which he stated the charges against the relator and notified him that he would be allowed an opportunity at the commissioner's office on the 14th, at 12 o'clock, to make an explanation as to the matters specified, and unless the explanation was satisfactory he would be removed from the office of superintendent of repairs and supplies. It cannot be denied that the communication of the commissioner sufficiently specifies the cause of removal, stating the facts out of which they arose with sufficient distinctness so as to advise the relator of the grounds upon which the charges were founded. If the facts alleged were true they showed a failure of the officer to perform his duties, and such neglect as would have authorized his removal if no satisfactory explanation was made. It also appears that at the time and place named in the notice the relator appeared in person and by his counsel, and submitted a statement or explanation in writing, in which, after stating that he would be ready at any time or place to controvert or explain the charges made, if legal evidence was produced to sustain the same and an opportunity be given to explain or disprove them, he took issue on some of the allegations, explained others, and then claimed that the charges should be reduced to writing, definitely and specifically preferred, and lawful evidence produced to sustain them, and that he be allowed to answer them and produce evidence to controvert them, and that he be allowed counsel. A conversation then took place between the relator, his counsel and the commissioner in which a trial was demanded by the relator upon the charges made, and that they should be proved by evidence, and an opportunity be furnished to controvert the same. The position of the relator was that formal charges should be presented with strict accuracy, and that a regular trial should be had upon the same, partaking somewhat of the character of such a proceeding in a court of

law. The commissioner signified his willingness to receive any further statement or explanation at that time, saying that the statement made was entirely unsatisfactory, and he refused to give the relator any further opportunity to answer the charges, in other words, he denied the right of the relator to a formal trial. On the next day the commissioner notified the relator in writing of his removal from office.

In regard to the charges made the written communication and notice sent by the commissioner to the relator were sufficiently specific and distinct for the purpose of advising him as to their true character. They set forth various instances in which it was alleged the relator had been guilty of a dereliction of duty, with sufficient particularity, so that he could meet and explain the same. The charges as made were sufficient to answer the purpose intended, and were within the requirements of the statute under which the proceeding was had. It was not necessary that the proceedings should be conducted with that degree of exactness which is required upon a trial for a criminal offense in an ordinary tribunal of justice, and it cannot be said that the charges made were insufficient.

The next inquiry which arises is whether the commissioner committed an error in his decision in refusing to require that evidence should be given to establish the allegations made, and in not allowing testimony to be introduced in favor of the relator. The commissioner was acting by virtue of the statute already cited, and he was bound to follow its provisions, and to fulfill its requirements and nothing more. There is nothing in the statute which requires that the cause of removal shall be established by proof taken before the commissioner. It seems to have been intended that the commissioner should exercise this power upon facts within his own knowledge, or based upon information received by him, after communicating to the relator his purpose of removing him, with notice of the reason why he proposed to take such action, and after allowing him an opportunity to make explanation as to the facts assigned as grounds for the removal. No testimony is required to be taken as to the basis of the commissioner's action; it is enough

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that he assigns a sufficient cause for the removal, and furnishes an opportunity to the relator for explanation of the same. This tends to prevent removals without any cause whatever, or upon personal or political grounds. It would be unnecessary to take proof of neglect or omission of duty within the knowledge of the chief of the department, and the statute does not require any such formality. The chief of a department, under the statute, is authorized and required to inform the subordinate of the grounds which induced him to believe the subordinate to be negligent, unfit or incapacitated to perform his duties, and for which he proposes to remove him. The statute makes no provision for a formal trial, it does not require that witnesses shall be produced by the commissioner, and that the officer shall be permitted to cross-examine the same, or that he shall be allowed to produce witnesses for himself, or to be heard upon a trial, but simply and alone allows him to make explanation, and then leaves the matter of removal in the discretion of the commissioner. Having in view the fact that the commissioner, in the proper discharge of his duties, would have knowledge generally as to any neglect or remissness of his subordinate officer, or that he would have information from which he would be justified in drawing an inference as to his acts and conduct, it is a fair and reasonable assumption that it was the intention of the statute to commit to the commissioner the power to remove for reasonable cause to act upon his own knowledge, as to the facts, and to determine when within his knowledge, so far as they were denied by the relator, and to judge whether the excuses presented by him were reasonable and sufficient, so far as they were not denied. Such a discretion is not unlimited, and can only be exercised for some reasonable cause as was held by ALLEN, J., in *People, ex rel. Sims, v. Bd. Fire Comm'rs* (73 N. Y. 440). Without it the power of removal might be of little avail. If the commissioner was to be constituted a court for the purpose of trying every charge which might properly be preferred for violation of duty, it would tend very much to embarrass the action of that officer, and also interfere with the interest of the public. If a trial was to be had the

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law no doubt would have so provided, and not for an explanation merely. In cases where the legislature intended that the removal should not be made without cause proven, provision is made for the preferring of charges, and an examination of the same. This rule prevails as to members of the police force. (§ 41, chap. 385, Laws of 1873.) And, also, as to firemen. (§ 77, *ibid.*)

It is insisted by the learned counsel for the appellant that no distinction exists as to the construction to be placed on section 28, cited *supra*, and section 25 of the same act, which relates to removals by the mayor and which is as follows: "The heads of all departments, including those retained as above, and all other persons whose appointment is in this section provided for, may be removed by the mayor for cause and after opportunity to be heard." It is claimed that the provisions of both these sections relating to removal of officers are substantially the same, and that this view is sustained by the decisions of this court. The cases cited to sustain this position do not go to the extent claimed for them by the appellant's counsel. In *The People, ex rel. Sims, v. Board of Fire Commissioners* (73 N. Y. 440), the question was, whether the board had the right to remove an officer, who was not the head of a bureau or a clerk, and it was held that the relator was a subordinate ministerial officer, removable at the pleasure of the board. No question was made as to the interpretation to be given to the language of section 28, which has been referred to. The remarks of ALLEN, J., already referred to, are not inconsistent with the right to remove where reasonable cause exists within the knowledge of the commissioner. In *The People, ex rel. Munday, v. Board of Fire Commissioners* (72 N. Y. 445), the relator was a regular clerk in the fire department; a notice was served on him requiring him to show cause why he should not be removed, without stating any cause for the proposed removal. The relator appeared and asked to be informed of the cause for his removal; none was stated; but the board requested him to show cause why he should not be removed, and he was thereupon discharged. It will be seen that no cause

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whatever was assigned, and therefore no opportunity was furnished for an explanation. The opinion of ALLEN, J., properly holds that the removal must be for cause, and that the statute must be pursued by allowing an explanation of the unfavorable appearances, or disproving the charges. This may be done orally or in writing, or perhaps when a positive fact is asserted and not within the knowledge of the commissioner and susceptible of a direct denial, by affidavits. The case cited does not decide that a regular trial should be had in which evidence could be introduced on both sides in reference to the charges made. In *The People, ex rel. Campbell, v. Campbell* (82 N. Y. 247), the facts were all conceded by the relator, and no question in relation to the necessity of a formal trial, or of proving facts averred on the one side and denied on the other, was presented. The case turned upon the question, whether the fact averred and admitted to be true was of itself properly the subject-matter of the charge against the relator, inasmuch as it appeared that a person not under the relator's control was chargeable with the negligence. The opinion does not hold that a regular trial must be had under section 28, in such a case. From the authorities referred to, we think there is no ground for the position that the same construction is to be placed upon section 28 as given to section 25 in the case of *People, ex rel. Mayor, etc., v. Nichols* (79 N. Y. 588), where it was held that the charges must be specified, and, unless admitted, must be proven to be true, with the right to the relator to cross-examine witnesses, and call others, and in this and other steps in the proceedings to be represented by counsel.

It is apparent, we think, that a wide distinction exists between the two sections. Section 25 relates to removals by the mayor of heads of departments, while section 28 refers to subordinates in office. Under the charter of 1870, heads of departments could be removed only after impeachment or trial, and until 1873 all subordinates, including heads of bureaus and clerks, were removable at the pleasure of the heads of departments. These distinctions were followed in the charter of 1873, and the language applicable to the different officers is not the

same. In section 25 the removal is only to be had "for cause, after an opportunity to be heard," which implies that a hearing must be had, which is equivalent to a trial, as the case last cited holds. The language of this section is direct and peremptory. Under section 28 the officer is to be informed of the cause of removal, and permitted, not to have a hearing or trial, but only an opportunity to make an explanation in reference to the charges preferred. There is a difference between a hearing and an explanation. The former may well import, as has been held, a formal trial, while the latter involves merely an oral or written statement as to the charges made without that precision and formality which is required upon a hearing or trial. The one has reference to officers of a higher grade, who are charged with dereliction of duty before the chief magistrate of the city, while the other relates to such officials who are called to account by the head of the department in which they are employed. Under section 25 the removal is not accomplished without the approval of the governor, while under section 28 it rests with the head of the department, on proper cause being shown. The difference between the two sections is so marked and manifest that there appears no valid ground for contending that the same interpretation should be given to each of them.

An examination of the charges made evinces that most of them must have been within the knowledge of the commissioner. They related to a neglect of duty on the part of the relator, and it is not difficult to see that the commissioner, who was familiar with the transactions, might properly have decided that the introduction of evidence by the relator could not have explained the charges made in a satisfactory manner. A brief reference to the charges made discloses beyond any question that one at least of them was conceded to be true, or sufficiently and fully established. This of itself would justify the conclusion at which the commissioner arrived. The first charge was neglect and inaction in the matter of fitting up two armories. The relator, by way of answer, denied that such work came under his charge, and alleged that he was not

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responsible for the neglect. The answer was in the nature of a demurrer. If the relator was responsible, then the charge was established, and there would be no necessity of a trial on the other charges. Even if he had denied the other charges, the commissioner was justified in holding that this one was sufficient to authorize his removal. The armories were clearly under the charge of the relator (Subd. 7, § 72, chap. 335, Laws of 1873), and, as this allegation was clearly admitted and no defense interposed or time asked to present proof in regard to it, the decision of the commissioner should be upheld, even if the other charges are not sustained. As to the second charge, as to constructing an elevator in the court-house, the relator answered that his delay was caused by the acts or orders of the acting commissioner. There was no officer known as such acting commissioner, and the commissioner himself only had charge and knowledge in regard to the work. This being within his knowledge, it would seem that he was justified in considering this explanation unsatisfactory. The third charge was that the estimates of cost of work were flagrantly incorrect. This was denied by the relator. As it was a fact within the commissioner's knowledge, evidence on the subject would seem to be of no avail, and the denial could not well have been substantiated if delay had been granted to produce evidence. The fourth charge, of delay in forwarding bills, was acknowledged to be true in some cases, and the excuse was made that the examination of the same could not be accomplished within the time named. The commissioner was acquainted with the facts relating to these bills, and it was within his province to determine whether the excuse made was sufficient and satisfactory, and the conclusion arrived at by him cannot be reviewed. To the fifth charge, in reference to a want of clerical help in the relator's bureau, he answered that he had notified the commissioner from time to time of such inefficiency. The correctness of the answer made was manifestly within the knowledge of the commissioner, and it was clearly for him to say whether the introduction of evidence could have changed the aspect of the case, or in any way support the relator's

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answer in this respect. He clearly had the right to judge as to the truth of the allegation, which was within his own knowledge, and his decision in regard to this answer was conclusive.

The point is made that relator should have been allowed a reasonable time and opportunity to produce evidence or proof by way of explanation. The question as to the reasonableness of the time allowed must to a great extent rest in the discretion of the commissioner, and, as it does not appear in this case that such discretion was abused, we do not think that the time fixed and the refusal to grant further time, of itself, furnishes ground for a reversal of the order. There is no other question in the case which demands discussion, and the order of the General Term should be affirmed, with costs.

All concur.

Order affirmed.

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THE BANK OF CALIFORNIA, Respondent, v. WILLIAM H. WEBB
et al., Appellants.

A debtor paying money to a creditor, to whom he owes several debts, must, as a general rule, exercise his option as to the application of the payment at the time it is made.

If no direction is then given by him the creditor may control the application; and, as between him and the debtor, there is no limit of time within which he must make the application, save that it be before it is made under the direction of the court, at least unless the debtor requests him to exercise his option.

Defendants guaranteed the payment of all drafts drawn by A. upon the A. G. Co. during a period ending July 31, 1879, provided the amount guaranteed should not at any one time exceed \$13,000; the guaranty to be continuous, and upon payment of any draft, to be in full force as to any others until payment of the last draft drawn during the period named. A. drew a draft for \$13,000, and subsequently another for \$8,000, neither of which was paid at maturity. In an action upon the guaranty the complaint averred the non-payment of the first draft. Defendants alleged and gave evidence tending to show a payment made after the commencement of the action of \$2,144; more than a year thereafter it was credited by plaintiff against the \$8,000 draft. *Held*, that plaintiff had

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writing that the guaranty was to be continuous during the period named, and that upon the payment by the company of any of the drafts the guaranty was again to be in full force and effect, as to any other of the drafts until the maturity and payment of the last draft made during the period named. Thereafter on the 30th day of June, 1879, Adams as agent of the Guano Company drew a draft at sixty days sight upon the company for \$13,000, payable to the order of Bishop & Co. and on the 7th day of July he drew a similar draft for \$8,000. Both drafts were by Bishop & Co. before maturity indorsed to the plaintiff; and both were accepted, were unpaid at their maturity and were duly protested for non-payment. In November, 1879, this action was commenced against the defendants upon their guaranty, to recover the amount of the first draft. In their answer they admit the drawing of the draft, its acceptance, non-payment, protest, a demand upon them for its payment and their refusal to pay; and they allege that the Guano Company had delivered to the plaintiff a bill of lading of a cargo of guano on board ship worth about \$8,000, which cargo had been sold, or would soon be sold, and that the proceeds thereof were to be applied and should be applied upon the draft in suit; and also that the company had in January, 1880, paid to apply upon the draft the further sum of \$2,545.47. Upon the trial of the action which took place in December, 1881, the plaintiff called as a witness Henry B. Laidlow of the firm of Laidlow & Co., who were its New York agents, who proved the indorsement of the draft to the plaintiff, and that since the commencement of the action two payments of \$1,500 each, made respectively December 20, 1880, and June 25, 1881, had been made upon the draft. He was then cross-examined by defendants' counsel, and testified that Bishop & Co. were bankers in Honolulu and that the receipt for the bill of lading dated October 21, 1879, mentioned in the answer, reciting that the bill was on account of the two drafts, was sent by them to him, and that the proceeds of the guano were \$7,199.92, and that the plaintiff had also through Bishop & Co. at Honolulu, on the 6th day of January, 1880, received the further sum of

\$2,144. The sole controversy between the parties is as to the application of this sum, the plaintiff claiming that it was applicable upon the draft for \$8,000, and the defendant that it was applicable *pro rata* upon the two drafts. The court below held that none of it was applicable upon the draft in suit, and we are of the same opinion.

The defendants alleging payment of the sum of \$2,144 upon the two drafts were required to prove the payment, and this they attempted to do by the cross-examination of plaintiff's witness Laidlow. He had no personal knowledge of the payment; all he knew about it was from information communicated to him by letter from Bishop & Co. If his evidence were stricken out or disregarded, then the defendants would have no evidence whatever of the payment. We must, therefore, take his evidence about the payment as he gave it, and that is that in September, 1881, Bishop & Co. informed him by letter that the payment had been made January 6, 1880, and he then as the authorized agent of the plaintiff credited the amount against the draft of \$8,000. Plaintiff offered to read in evidence the letter of Bishop & Co. advising Laidlow & Co. of the payment, but it was excluded on the ground that it was a mere declaration of past events by Bishop & Co. The exclusion was improper. All the proof the defendants had of the payment was the information conveyed by that letter, which was called out upon their cross-examination of plaintiff's witness. They thus made the contents of the letter their evidence, and the plaintiff was entitled to have it read in evidence. Either that letter was competent or the entire evidence of the witness was incompetent and should have been stricken out or disregarded. We must then take it as proved in this case that this sum was received by the plaintiff in January, 1880, after the commencement of this suit, and more than a year thereafter credited against the draft for \$8,000. That it had the right thus to apply the payment is established by abundant authority. (*Stone v. Seymour*, 15 Wend. 20; *Sheppard v. Steele*, 43 N. Y. 53; 3 Am. Rep. 660; *Harding v. Tift*, 75 N. Y. 461; *Nat. Bank of Newburgh v. Bigler*, 83 id. 51; *Mayor*

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of *Alexandria v. Patten*, 4 Cranch, 317; *Simson v. Ingham*, 2 Barn. & Cress. 65; *Philpott v. Jones*, 4 Nev. & Man. 14; *Field v. Holland*, 1 American Lead. Cases, 362.) The rules as gathered from these authorities, subject to some modifications depending upon circumstances which do not exist in this case, are as follows: A debtor paying money to a creditor to whom he owes several debts may direct the application of the payment because the money is his and he may do as he will with it and control its application. But the debtor must exercise his option as to the application when he makes the payment. After that the money has ceased to be his and is no longer subject to his control. Then it belongs to the creditor, and he is master of it, and may control its application. As between him and his debtor, certainly unless the debtor intervenes and requests him to exercise his option, there can be no limit of time within which he must make the application. But if neither party makes any application of the payment and the matter comes into court, then the court will make such application of the payment as equity and justice require. Here the debtor, the Guano Company, made no application of the payment at any time, and hence the creditor, the plaintiff, could at any time make the application before it was made under the direction of the court, and so the application here made was not too late.

But we think there is another view of this case still more favorable to the plaintiff. The guaranty of the defendants was a continuing one to the extent of \$13,000. It was not confined to drafts amounting to just \$13,000, or to not more than that sum or to just one draft drawn for that sum. Such was clearly not the purpose and understanding of the parties. The defendants were willing to guarantee all the drafts of the company, only limiting the amount of their liability upon all of them at any one time to the sum of \$13,000. There might be one draft for \$13,000 or more. There might be several drafts amounting in the aggregate to \$13,000 or more. But in no event was the liability of the defendants to exceed \$13,000. Up to that amount it was to be effectual to

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the plaintiff. It, therefore, covered the two drafts, and both were unpaid. The plaintiff recovered less than \$7,000 in this action. The defendants were liable to the plaintiff on account of the other draft for the balance up to \$13,000. The plaintiff could have sued upon the guaranty on account of both drafts, and could after applying all the payments have recovered \$13,000, the full extent of defendants' liability. Hence no harm was done to them by applying the \$2,144 upon the draft for \$8,000. So long as there was \$13,000 due upon both drafts it could make no legal difference with the defendants how the payments were applied. As the case now appears, if all these payments, made after the commencement of this action, could have been applied upon the \$8,000, leaving the plaintiff to recover the \$13,000 in this action, it would have been entirely just and equitable, and if the parties had made no application of them, such an application would have been sanctioned by rules of law laid down in the authorities cited.

We are, therefore, of opinion that the judgment should be affirmed.

All concur.

Judgment affirmed.

JOHN SEGELKEN, by his Guardian, etc., Respondent, v. OTTO MEYER, Appellant.

An action to recover money or personal property belonging to an infant may be brought in the name of the infant by his guardian *ad litem*, although he has a general guardian. While the statute gives to the latter the custody and management of the infant's personal estate (2 R. S. 150, § 3), the beneficial interest is in the infant and he may maintain the action. (Code of Civil Procedure, § 468.)

Plaintiff's father died intestate; his mother was appointed administratrix and also general guardian for the infant children, five in number. A settlement of the accounts of said administratrix was had and a final decree entered by the surrogate fixing the shares of the infants; subsequently two of them died intestate. Defendant was the attorney, counsel and proctor for the widow, and as such received moneys belonging to the

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94	473
121	563
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estate. Upon an accounting he gave to the widow a written acknowledgment stating that there was due to her, as guardian for the three surviving children, the sum of \$1,500, payable according to the surrogate's decree, interest thereon to be paid semi annually. Subsequently the widow died and K. was appointed by the surrogate general guardian of the plaintiff, who, being still an infant, brings this action by said K. as his guardian *ad litem*, duly appointed for that purpose to recover his share. *Held*, that the action was well brought, and that a good cause of action was shown for \$500; that the acknowledgment was an admission that the money belonged to plaintiff and had been held by his general guardian in trust for him; and, even if not originally collected and received by defendant for plaintiff, but paid over to him by said guardian, as he had knowledge that it was a trust fund, he received it impressed with the same trust, and plaintiff's share therein having been ascertained and agreed upon, he could follow the fund and maintain an action for his share.

The acknowledgment also stated that defendant was indebted to the widow as next of kin of the two deceased children in the sum of \$1,000. It was admitted that this sum was due the widow and the three surviving children as next of kin, she in her own right and as guardian for them being entitled to receive it; it also appeared that defendant had promised plaintiff's attorney to pay his share, and raised no objection because of the non-appointment of an administrator. *Held*, that in the absence of proof that administration upon the estates of the deceased children had been granted, plaintiff was entitled to recover in this action his share (one-fourth) of said sum.

While a person may not, as next of kin simply, sue to recover personal property of a deceased person, a recovery by next of kin may be permitted without the intervention of an administrator, under special circumstances, as where his right to the property is clear and has been admitted by defendant.

An agent or person acting in a fiduciary capacity is not subject to an action for tort for mere acts of omission, as for not paying over money due, but only for acts of misfeasance, and in an action against him for not accounting or not paying over a balance found due on an accounting, the plaintiff does not, by adding to the allegation of refusal to pay an assertion that defendant has converted the money to his own use, convert the action into one for tort; the addition is mere surplusage.

The complaint alleged the employment of defendant as attorney, etc., and that while so employed he received the money in question "in a fiduciary capacity," that the same had been demanded, but that he neglected and refused to pay the same and had converted it to his own use. *Held*, that the cause of action was one *ex contractu* not *ex delicto*.

Also *held*, that proof that defendant had received money to which plaintiff was entitled was sufficient to sustain the action; that notwithstanding the allegation that defendant received it in a fiduciary capacity, if no

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order of arrest had been granted during the pendency of the action, the effect of the judgment would not be to subject defendant to an execution against his person (Code of Civil Procedure, § 1487), and so proof of the allegation was not essential.

In the cases where under the Code of Civil Procedure (§ 550) the right to arrest depends upon facts extrinsic the cause of action, and where no execution against the person can issue unless an order of arrest has been obtained and executed before judgment, these extrinsic matters need not be alleged in the complaint, and if alleged, are immaterial to the cause of action and need not be proved upon the trial.

(Argued December 15, 1883; decided January 22, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 14, 1880, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 22 Hun, 6.)

This action was brought to recover for moneys alleged in the complaint to have been received by defendant, an attorney and counselor, "in a fiduciary capacity," which belonged to the plaintiff as next of kin of John F., Adeline and Mary S. Segelken, deceased.

The material facts are stated in the opinion.

Almet F. Jenks for appellant. If the action were brought in tort it could not be maintained. (*Moran v. Lord*, 40 N. Y. 477; *Peck v. Sheldon*, 48 id. 365; *Fordham v. Smith*, 44 How. 472.) The provision for and payment of interest is fatal to the plaintiff's claim of a holding in a fiduciary capacity. (Webster's Dic., "Interest;" *Dry Dock B'k v. Am. L.*, 3 N. Y. 344; *Gaar v. L. B. Co.*, 11 Bush, 180; *Hubbard v. Callahan*, 42 Conn. 528; Bouvier's Law Dic., title "Interest;" *Bussing v. Thompson*, 15 How. Pr. 97-100; 6 Duer, 696; *McBurney v. Martin*, 6 Robt. 508; *Com. B'k v. Hughes*, 17 Wend. 100; *Stall v. Keen*, 8 How. Pr. 300-1; *Cotton v. Sharpstein*, 14 Wis. 233; *Robbins v. Falconer*, 43 Sup. Ct. 363; *Goodrich v. Dunbar*, 17 Barb. 644; *McBurney v. Martin*, 6 Robt. 502; *Stall v. King*, 8 How. Pr. 298.) Section 179 of the old Code, does not apply to a case where, by agree-

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ment, an agent might use the principal's money as his own; he promising simply to pay the amount on demand, but only to a case where the agent is to return the identical money, or its traceable proceeds, to the principal. (*Robbins v. Falconer*, 43 Sup. Ct. 363; *Walter v. Bennett*, 16 N. Y. 250; *Connaughty v. Nichols*, 42 id. 83; *Greene v. Rosenstock*, 61 id. 583; *Vilmar v. Schell*, id. 564; *McBurney v. Martin*, 6 Robt. 502; *Goodrich v. Dunbar*, 17 Barb. 644; *Angus v. Duncomb*, 8 How. Pr. 14; *Morange v. Waldron*, 6 Hun, 529; *B. F. O. A. v. Woodman*, 1 Heub. 41; *Bussing v. Thompson*, 15 How. Pr. 97-100; *Sutton v. DeCamp*, 4 Abb. Pr. [N. S.] 483.) A general deposit of money subject to call does not constitute a fiduciary relation. (*Hersey v. Devereux*, 72 N. C. 462.) That was no evidence whatever of a conversion. (*Marvin v. Ellwood*, 11 Paige, 365; *Sims v. Brown*, 6 N. Y. S. C. 5.) There was no support of an action in tort. (*Greentree v. Rosenstock*, 61 N. Y. 583; *Connaughty v. Nichols*, 42 id. 83.) The omission or refusal to pay over moneys received by a factor or agent, or trustee, in the course of his agency or trust, will not lay the foundation for an action of trover. (Paley on Agency, § 79; *Weymouth v. Boyer*, 1 Ves. Jr. 425; *Walter v. Bennett*, 16 N. Y. 250; *Harris v. Schultz*, 40 Barb. 315; *De Graw v. Elmore*, 50 N. Y. 1; *Kimball v. Huntington*, 10 Wend. 680; Chitty on Bills, 41, 324, 334-428; *Russell v. Whipple*, 2 Cow. 536; 3 Kent's Comm. 74; 1 Parsons on Notes and Bills, 84, 24; Byles on Bills, 8; *Smith v. Allen*, 5 Day, 337; *Laqueer v. Prosser*, 1 Hill, 259; *Jacquin v. Warren*, 40 Ill. 459; *Brady v. Chandler*, 31 Mo. 28; *Sackett v. Spencer*, 29 Barb. 186; *President v. Hurtin*, 9 Johns. 217; Chitty on Bills, 428; *Allen v. Patterson*, 7 N. Y. 479; *United States v. State B'k of N. C.*, 6 Peters, 29; *Underhill v. Phillips*, 10 Hun, 592; *Payne v. Gardner*, 29 N. Y. 146-172; Story on Bailments, 99, 86, §§ 88, 84; Pothier, Traite de Depot, 82, 83; *Dunford v. Seghers*, 9 Martin, 484.) An affirmance founded on the defendant's liability *ex contractu*, should not suffer the plaintiff to issue execution against the defendant's person. (*Elwood v. Gardiner*, 45 N. Y. 351-354;

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Neftel v. Lightstone, 77 id. 96; *Smith v. Knapp*, 30 id. 585; *Segelken v. Meyer*, 22 Hun, 6; *Hill on Trustees*, § 518; *Perry on Trusts*, § 832; *In the Matter of H.*, 87 N. Y. 525; *Wolcott v. Hodge*, 81 Mass. 547; *Chapman v. Forsyth*, 2 How. 202; *Hayman v. Pond*, 7 Metc. 328.) The suit should have been brought by the general guardian of John Segelken. (2 R. S. 150, § 3, 151, § 10; *Seaton v. Davis*, 1 T. & C. 91; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Tuttle v. Hearey*, 59 Barb. 334; *White v. Parker*, 8 id. 48; *Genet v. Tallmadge*, 1 Johns. Ch. 5; *Thomas v. Bennett*, 56 Barb. 197; *Chapman v. Tibbits*, 33 N. Y. 287; *Beecher v. Crouse*, 19 Wend. 306.)

Christian G. Moritz for respondent. The plaintiff had legal capacity to sue. (*Segelken v. Meyer*, 14 Hun, 593; *Schouler on Domestic Relations*, 462, note, 463; *Stratton's Case*, 1 Johns. 508; *Bradley v. Amidon*, 10 Paige, 235; *Porter v. Bleiler*, 17 Barb. 149; *MacPherson on Infants*, 354; *Hutchins v. Johns*, 82 Conn. 376; 26 Me. 76; 11 Ill. 24.) Where trust and confidence are reposed by one party in another, and such other accepts the confidence, etc., equity will convert him into a trustee whenever it is necessary to protect the interest of the confiding and do justice between them. (*Gen. Mut. Ins. Co. v. Benson*, 5 Duer, 168; 2 Bosw. 272; *Power v. Hathaway*, 43 Barb. 214; *Tiffany and Bullard on Trustees*, 480, 481, 482.)

RAPALLO, J. John F. Segelken died in 1864 intestate, leaving a widow, Gesche Segelken, and five infant children, of whom the plaintiff is one. The widow, who was also mother of the children, was appointed administratrix of the estate of her husband, and general guardian of the children, by the surrogate of the county of New York, and the defendant acted as proctor and counsel for her as such administratrix and guardian, in the settlement of the estate, as well as in her other affairs, and continued so to act from a short time after the death of the intestate, until January, 1873. A settlement of her accounts as administratrix was had before the surrogate of the

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county of New York, and on such accounting the defendant acted as her proctor and counsel. A final decree was entered by the surrogate on such accounting in May, 1870, whereby the amount in the hands of the administratrix for distribution was adjudged, and she was directed to pay the shares of her five minor children to herself as their general guardian.

After this decree, and in the year 1871, two of the children died intestate.

It was found by the court, on the trial of this action, that during the time the defendant was attorney, counsel and proctor of the widow and children of John F. Segelken, the defendant received, in a fiduciary capacity, moneys belonging to his estate, and to which said widow and children were legally entitled, and that on or about the 2d of January, 1873, he had an accounting with the widow, whereupon it was found that he was indebted to her as guardian of her children Gesche, John and Carsten in the sum of \$1,500, and as next of kin of Adeline and Sophie (the deceased children) in the sum of \$1,000, payable according to the decree of the surrogate, all of which moneys were received and retained by the defendant as the attorney, counsel and proctor of said widow and children.

On the trial a written acknowledgment, signed by the defendant, was put in evidence, which reads as follows: "Due Mrs. Gersche Segelken as guardian of her children Gesche, John and Carsten Segelken, the sum of \$1,500, and as next of kin of Adeline and Sophie Maria the sum of \$1,000, payable according to a decree of the surrogate of the county of New York, interest to be paid on the money to Mrs. Segelken July and January 1 of each and every year. Otto Meyer, January 2, 1873."

Gesche Segelken, the widow and guardian, died in 1876, and Andrew Koch was in 1877 appointed by the surrogate of Queens county general guardian of the plaintiff, who, being still an infant, now brings this action by said Andrew Koch as his guardian *ad litem*, duly appointed for that purpose, to recover the plaintiff's share of the before-mentioned fund in the hands of the defendant.

The objection is taken that the action is improperly brought by the infant in his own name, by his guardian *ad litem*, and that it should have been brought by the general guardian of the infant in his own name as such general guardian.

The question whether an action to recover money or personal property belonging to an infant should be brought by his general guardian where he has one, or by the infant himself through a next friend or guardian *ad litem*, has been discussed in several cases, but does not appear to have ever been decided by this court. The Revised Statutes prescribe that a testamentary guardian shall have the custody and management of the personal estate of the minor, and of the profits of his real estate, and may bring such actions in relation thereto as a guardian in socage might by law (2 R. S. 150, § 3), and that guardians appointed by surrogates have the same powers as testamentary guardians. (2 R. S. 151, § 10.)

As a guardian in socage has to do only with the real estate of the infant, it has been claimed in some cases that the Revised Statutes empower a general guardian to bring actions only in relation to such real estate and the rents and profits thereof; and as to such actions it has been held that they can be maintained by the general guardian only. (*Seaton v. Davis*, 1 T. & C. 91.)

In *Thomas v. Bennett* (56 Barb. 197), it was held in an elaborate opinion by FOSTER, J., that a general guardian might maintain an action in his own name to compel the defendant to pay over pension moneys belonging to the infant, which the defendant had collected under a contract between him and the general guardian for the benefit of the infant. This decision is placed on the statute (2 R. S. 151, §§ 3 and 10), which the learned judge construes as empowering the general guardian to bring actions in relation not merely to the rents and profits of the real estate of the infant, but also in relation to his personal estate, and on the further ground that the guardian could maintain the action as the trustee of an express trust.

But in *Bradley v. Amidon* (10 Paige, 235, 239), the chancellor decided that a general guardian appointed by a surrogate

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was not authorized to file a bill in his own name to obtain possession of personal property of his infant wards, but must file it in the name of the infants as their next friend. That a decree made in the suit brought by the general guardian would not protect the defendants from further litigation even with the infants themselves, and that the bill should be dismissed on the ground that it was filed by a sole complainant who had no interest in the subject-matter of the suit.

Notwithstanding the appointment of a general guardian, the title to the property is in the infant. The statute gives to the guardian the custody and management of the personal estate, but the beneficial interest is in the infant.

The Code of Civil Procedure (§ 468) contains a provision similar to that contained in the Revised Statutes authorizing infants to maintain actions by guardian *ad litem*, and it recognizes this right in cases where the infant has a general guardian, for it authorizes the general guardian to apply for the appointment of a guardian *ad litem*, and section 476 shows that it is contemplated that the general guardian may himself be appointed guardian *ad litem*, and sue as such in the name of the infant. By section 1686 of the Code of 1880, it is provided that real actions may be brought by infants, and that section 468 shall apply to such actions, and the note to section 1686 states that its object is to abolish the rule laid down in *Caggar v. Lansing* (64 N. Y. 417), and *Seaton v. Davis* (*supra*), and to assimilate ejectment and other real actions in this respect to the general rules established by the Code.

We think that the action was well brought in the name of the infant by his guardian *ad litem*, and that a good cause of action in the plaintiff was shown for the \$500 which was by the instrument of January 2, 1873, admitted to be due from the defendant to plaintiff's mother as his general guardian. This was equivalent to an admission that the money belonged to the plaintiff, and had been held by his general guardian in trust for him, and even if not originally collected and received by the defendant for the plaintiff, but paid over by the guardian to the defendant as he contends, it was received by him

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with knowledge that it was a trust fund. If loaned, it was improperly placed in his hands without security, and he received it impressed with the same trust as that upon which the guardian had held it, and the share of the plaintiff in the fund having been ascertained and agreed upon, he could follow the fund and maintain an action for his share.

But in addition to the \$500 to which the plaintiff became entitled as next of kin of his father, he has recovered \$250 for his share of the \$1,000 which belonged to his two sisters who died after his father, and after the decree of the surrogate settling the accounts of the administratrix. This \$1,000 is stated in the written acknowledgment to be due to Mrs. Segelken as next of kin of the two deceased children. It was in fact due to her and the three surviving children as such next of kin, and in this action it was so adjudged. It was admitted, however, by the defendant that it was due to the next of kin of the deceased children, and Mrs. Segelken in her own right and as guardian of the three surviving children was ultimately entitled to it. But it is contended that they had no right of action directly against the defendant for that money, and that only an administrator duly appointed to administer upon the estates of the two deceased children could legally maintain an action for it. The appellant is technically correct in this position. As next of kin simply, the plaintiff could not sue to recover personal property of his deceased sisters. *Woodin v. Bagley* (13 Wend. 453) and *Beecher v. Crouse* (19 id. 306) are directly in point on that question. But nevertheless a recovery by next of kin of a deceased person, of personal property left by the deceased, without the intervention of an administrator, has, under special circumstances, been permitted. In *Hyde v. Stone* (7 Wend. 354), the plaintiff after becoming of age brought an action of trover to recover the value of certain personal property of which his father had died possessed. The plaintiff was the only child. After his father's death the property went into the possession of his mother. She married again and then died, and her second husband took possession. The general guardian of the plaintiff then demanded the prop-

erty of his step-father, who admitted his right. The value of the property was estimated, and the defendant offered to the guardian to pay it if he would give a release. The son when he became of age sued his step-father in trover for the value of the property converted by him. The court said that it could not be necessary that the plaintiff should go through the form of taking out letters of administration before he could get possession of such personal estate; that if administration had been granted to any other person, it was in the power of the defendant to have shown it, but that the defendant, having admitted the right of the plaintiff, ought not to object that he was responsible to the administrator of the estate of the plaintiff's father, and not to the plaintiff himself, who was the only person beneficially interested in that estate. This case is referred to in *Woodin v. Bagley* and *Beecher v. Crouse* (*supra*), and is there stated to rest on its own peculiar circumstances, and on the admission by the defendant of the plaintiff's right; but no disapproval of the decision is expressed. In the present case the deceased sisters of the plaintiffs were infants when they died. It is not to be presumed that they had any creditors, at the time of the commencement of the action, upwards of six years had elapsed since their death. It did not appear that their estates had ever been administered upon, and the defendant had admitted in his written acknowledgment that he was indebted to their next of kin for the \$1,000, and he promised to pay it according to the decree of the surrogate, by which decree the rest of the fund was payable to the mother as general guardian of her children. It was also testified to on the trial by Mr. Van Wyck, the attorney for the plaintiff in this action, that he demanded of the defendant the plaintiff's share of the money in his hands, and the defendant promised to pay it as soon as Mr. Koch should take out letters of guardianship of the plaintiff; that when they were obtained there was another excuse, but that the defendant did not refuse to pay on the ground that no administrator had been appointed for the deceased children; that if that objection had been made, witness would have had an administrator appointed immediately.

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We think the circumstances of this case bring it fairly within the case of *Hyde v. Stone*, and that taking that case as a precedent, the recovery can be sustained.

The defendant claimed at the trial that two items, one of \$400, loaned to Mrs. Segelken in 1869, and one of \$160, due him in the same year for professional services, had been by mistake left out of the accounting of January 2, 1873, when the due bill for \$2,500 was given. Some testimony of the defendant bearing on these items was stricken out by the court on the ground that it related to personal transactions with Mrs. Segelken, who was deceased. Whatever question there may be as to the correctness of this ruling, we cannot consider it here, as no exception appears to have been taken at the trial. The refusal of the judge to allow the items is excepted to, but it is obvious that they were not proved by uncontroverted evidence.

The point most strenuously urged upon the argument was, that the cause of action alleged in the complaint was receiving money in a fiduciary capacity and converting it to defendant's own use, and that, therefore, the action was for a tort. But that even if it should be held to be an action *ex contractu*, the allegation that the money for which the defendant is sued was received by him in a fiduciary capacity, was essential as characterizing the nature of the action, and a judgment against the defendant subjected him to an execution against the person. That consequently, whether the action was in tort or *ex contractu*, the allegation that the money was received in a fiduciary capacity was essential, and if not established, the plaintiff was not entitled to recover.

The defendant claims that the evidence not only fails to prove this allegation, but that it was disproved, and that the finding of the fact by the court is erroneous, being not only unsupported by the evidence, but contrary to the evidence, and consequently the complaint should have been dismissed.

We have examined the complaint and are satisfied that it is not framed in tort. It alleges that the defendant was employed as attorney and counsel of Mrs. Segelken, and her children, and while so employed, received in a fiduciary capacity moneys

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belonging to the estate of Frederick Segelken, deceased, and to which his widow and children were entitled. That on or about the 2d of January, 1872, he had an accounting with the widow, whereupon it was found that he was indebted to her as guardian and next of kin as before stated, and that all of said moneys were received and retained by the defendant as the attorney, counsel and proctor of said widow and children; that the plaintiff's share of said money was \$750; that said money so due him was received in the fiduciary capacity aforesaid and was frequently demanded from the defendant, but that he had neglected, and still neglected and refused to pay the same to the plaintiff, and had converted the same to his own use.

These allegations disclose merely a cause of action for money had and received by an agent or attorney in a fiduciary capacity which were the subject of an accounting, and that he had neglected and refused to pay over on demand the balance found due. This is clearly a cause of action *ex contractu*. An agent or a person acting in a fiduciary capacity is not subject to an action of tort, for mere acts of omission, such as not paying over money due, but only for acts of misfeasance, and in an action against an agent or attorney for not accounting, or not paying over a balance found due on an accounting, the plaintiff does not by adding to the allegation that the defendant has refused to pay over the money due, an assertion that he has converted it to his own use, convert the action into one for a tort. The addition is mere surplusage under the circumstances. It is a mere deduction from the facts stated, and in the connection in which it is used is not traversable. (*Greentree v. Rosenstock*, 61 N. Y. 588; *Conaughty v. Nichols*, 42 id. 88.) The action must, therefore, be treated as in form *ex contractu*. Treating it in that form, proof that the defendant has received money to which the plaintiff is equitably entitled, is sufficient to sustain the action, and the allegation that the defendant received the money in a fiduciary capacity is not essential to entitle the plaintiff to recover and need not be proved, unless the effect of a judgment for the plaintiff, where the complaint contains such an allegation, would be to subject

the defendant to an execution against his person, even if no order of arrest had been granted during the pendency of the action.

The solution of this question requires a critical examination of some provisions of the Code of Civil Procedure, as to which there is a difference of opinion.

This Code provides (§ 1487) that an execution against the person may issue :

First. Where the plaintiff's right to arrest the defendant depends upon *the nature of the action*.

Second. In any other case where an order of arrest has been granted and executed and not vacated.

Section 549, as it stood in 1877, when this action was commenced, enumerated the cases in which the right to arrest depended upon the nature of the action. In those cases the complaint necessarily alleged the facts showing such right of arrest, for they were identical with the facts constituting the cause of action, and must be proved to entitle the plaintiff to recover. By the amendment of 1879, the fourth subdivision of section 549 was added, which authorizes an arrest in an action on contract, where the defendant was guilty of fraud in incurring the debt or liability sued upon. But in reference to that particular class of cases, special provision is made that the fraud must be alleged in the complaint and proved upon the trial, or the plaintiff cannot recover.

Section 550 enumerates the cases in which the right to arrest depends upon matters extrinsic the cause of action, and in which no execution against the person can issue, unless an order of arrest has been obtained and executed before judgment. These extrinsic matters need not be alleged in the complaint, and if alleged are immaterial to the right of action and need not be proved upon the trial. The confusion which exists upon this point has arisen from the circumstance that in the enumeration of cases in this section, some are included which are also substantially included in section 549, and are unnecessarily repeated in section 550. This difficulty is found in subdivision 3 of section 550. All the other subdivisions of that section re-

late clearly to extrinsic matters exclusively, but subdivision 3 is rather mixed. Its language is:

"In an action to recover for money received, or to recover property, or damages for the conversion or misapplication of property, where the money was received, or the property was embezzled, or fraudulently misapplied, by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment, or by a factor, agent, broker or other person in a fiduciary capacity. But this subdivision does not apply to an action to recover a chattel."

By analyzing this section it is seen that it applies, *first*, to an action for money received, where the money was received by a public officer, or by an attorney, solicitor or counselor, or an officer or agent of a corporation or banking association, in the course of his employment, or by a factor, agent, broker or other person in a fiduciary capacity. In these cases it is apparent that the action is *ex contractu*, for money had and received to the use of the plaintiff, and that the fact that it was so received by the defendant in a fiduciary capacity is an extrinsic fact not necessary to be alleged or proved, to entitle the plaintiff to recover, and that if he desires to arrest the defendant on final process, he must obtain an order of arrest before judgment. On the other hand, subdivision 3 includes an action to recover damages for the conversion or misappropriation of property, where the property was embezzled or fraudulently misapplied by any of the specified persons, or by any person in a fiduciary capacity. It is difficult to understand for what reason the fact that the person, against whom damages are sought to be recovered for the conversion of property, was acting in a fiduciary capacity, should be required to be added to the charge of conversion to entitle the plaintiff to an order of arrest. But, notwithstanding this peculiar enactment, it can hardly be doubted that an action for damages for conversion by such a person would, under the provisions of section 549, be of such a nature as to entitle the plaintiff, if successful, to an execution against the person without any previous order of

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arrest, and that it would be necessary to prove the conversion in order to maintain the action, though it might not be necessary to allege, in the complaint, or to prove, the fiduciary capacity, which would be a fact extrinsic the cause of action, and that a failure to prove that allegation, if made, would not defeat the action, if the conversion and the plaintiff's right to damages were proved. A third class of cases are included in subdivision 3, viz.: actions to recover property, where the property was embezzled or fraudulently misapplied by a person in a fiduciary capacity. The same remarks apply to this class of cases. A cause of action to recover specific property might be set forth in the complaint, without disclosing a cause of action in its nature bailable, and in that case, an order of arrest must be obtained on affidavits showing the extrinsic facts essential to the right of arrest. In all the cases specified in section 550, the allegation of the capacity in which the defendant received the money or obtained the property, is immaterial to the right of action. That right would be the same, whatever the capacity in which the defendant acted. The fact affects simply the right of *arrest*, and is, therefore, a fact extrinsic the cause of action, which need not be alleged in the complaint, and, if alleged, need not be proved.

Subdivision 3 of section 550 was not changed by the amendment of 1879, but was in force as it now stands, when this action was brought.

Section 557 requires that to obtain an order of arrest under section 549, it must be made to appear by affidavit that a sufficient *cause of action* exists against the defendant *as prescribed in that section*. That is the only requirement, because the cause of action and the cause of arrest are identical (the only exception being the case of fraud which is specifically provided for by subdivision 4). But such is not the case in respect to section 550; the application for an order under that section must show, not only a sufficient *right of action*, as prescribed in that section, but also *the other matters extrinsic the cause of action* specified in that section. And section 558 requires that the complaint set forth a sufficient *cause of action*, as required

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by section 557. There is no requirement that any of the extrinsic facts be set forth in the complaint, except, as before stated, in the single instance of fraud in contracting the liability.

It cannot be argued that the requirement that the complaint set forth a sufficient *cause of action*, as required by section 557, has any reference to the fiduciary capacity in which the defendant was acting when he incurred the liability. Section 550 defines several classes of actions, and the requirement is that the complaint show a right in the plaintiff to maintain an action belonging to one of those classes. Subdivision 1 refers to *an action for the recovery of a chattel*, analogous to the common-law action of replevin. Subdivision 2 refers to *an action on contract*, express or implied. Subdivision 4, to *an action for specific performance*. Subdivision 3 refers, *first*, to an action *for money had and received*; *secondly*, to an action *for the recovery of property*; and *thirdly*, to an action *for damages for the conversion of property*. In each of these subdivisions the *nature of the action* is first stated, and then, after the word "*where*," the extrinsic facts which subject the defendant to arrest are set forth. To sustain an order of arrest under either of these subdivisions, the *complaint* must state facts sufficient to show a *cause of action* of one of the classes specified in the subdivision under which the plaintiff proceeds. If a plaintiff, obtaining an order of arrest, under subdivision 3, should set forth in his complaint only a cause of action for money lent, or on a promissory note, or for goods sold and delivered, or the like, the complaint would be so inconsistent with the grounds of arrest that the order ought to be vacated. We do not think that any thing further was intended than that the complaint should show that the action is one in which, on proof of the necessary extrinsic facts, an order of arrest may properly be granted. The object was not the same as that of subdivision 4 of section 549, viz.: To allow the defendant the benefit of a trial upon the allegations of the affidavits upon which his arrest was ordered, and to make the plaintiff's recovery depend upon his maintaining those allegations. If

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such had been the intention, explicit and unambiguous language, similar to that used in subdivision 4 of section 549, would have been adopted, and we should not have been left to spell out the intention by giving to the language used a more comprehensive meaning than that which its literal interpretation admits.

There is not the same reason for requiring the grounds of arrest to be tried in the action, where the allegation is of a fiduciary capacity, as where it charges fraud. A charge of fraud is essentially a question of fact, proper to be determined by a jury, while the question of fiduciary capacity is ordinarily one of law which the court is more competent to dispose of. It might well, therefore, be left as it was before the amendment of 1879, to be determined on a motion to vacate the order of arrest. (See *Republic of Mexico v. DeArangoiz*, 5 Duer, 634; *Wood v. Henry*, 40 N. Y. 124.) As to the grounds of arrest specified in subdivisions 1, 2 and 4, it is manifest that they have no proper place in the complaint.

It is suggested that the amendment made in 1879 to section 558 shows that it was intended to give to that section a broader meaning than that which I have attributed to it. The section, as it stood in 1877, provided that the order of arrest should be vacated if the complaint, when served, showed that the cause of action *was not* one of those specified in sections 549 and 550. The amendment of 1879 changed this language so as to require the order to be vacated if the complaint *should fail to show a sufficient cause of action* as prescribed by those sections. I do not think that this amendment was intended to make any substantial change; certainly not to require that any thing extrinsic the *cause of action* should be set forth. A very strong argument to the contrary is to be found in the circumstances that while the amendatory act of 1879 provides that the amendment of section 549 (being the amendment requiring that when fraud is made the ground of arrest it must be alleged in the complaint) shall not apply to existing suits (Laws of 1879, chap. 542, § 2), there is no such saving clause in regard to the amendment of sections 557 and 558. If this last amendment was intended to put the allegation of fiduciary

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capacity on the same footing as the allegation of fraud, there was the same reason for saving existing suits from the effect of the amendment as there was in the case of the amendment to section 549. The omission of such a saving clause clearly shows that no important change was intended.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

94	490
j 150	809

94	490
167	895
167	896

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
EDWARD J. COURTNEY, Appellant.

The act of 1869 (Chap. 678, Laws of 1869), declaring that on a criminal trial the accused "shall, at his own request, but not otherwise, be deemed a competent witness," is not violative of the provision of the State Constitution (Art. 1, § 6), declaring that no person shall "be compelled in any criminal case to be a witness against himself." The supposed moral coercion by reason of the adverse inference which might be drawn from the omission of the accused to testify is not compulsion within the meaning of the Constitution.

It seems that, had the statute authorized a presumption of guilt from an omission to testify, and so reversed the presumption of innocence, it would violate fundamental principles binding alike upon the legislature and the courts; but as it expressly precludes any presumption against the accused it is not subject to this objection.

Perjury may be assigned upon false testimony going to the credit of a witness who has given material evidence on a trial.

It seems that false swearing is perjury whenever the testimony is relevant to the case, although it may not directly bear upon the issue.

(Argued January 14, 1884; decided January 22, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, of the first judicial department, entered upon an order made December 21, 1883, which affirmed a judgment of the Court of General Sessions of the peace in and for the city and county of New York, entered upon a verdict convicting defendant of the crime of perjury.

The indictment charged, in substance, that defendant, on the

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trial of an indictment against him for forgery, testified in his own behalf, and gave material testimony; that in answer to questions put to him on cross-examination, he falsely testified that he never went by any other name than that of Edward J. Courtney; that he never was an inmate of the Eastern penitentiary of Pennsylvania; and that he never served a term of imprisonment in any prison. Defendant demurred to the indictment on the ground "that the facts stated in the indictment do not constitute a crime." The demurrer was disallowed.

On the trial, after proving the giving of the testimony as set forth in the indictment, the prosecution proved that defendant had been convicted and sentenced to imprisonment for three years in the Eastern penitentiary of Pennsylvania, under the name of Christopher Richards; and that he served his term in that penitentiary. At the close of the evidence, defendant's counsel asked the court to direct an acquittal, upon the ground that the alleged false statements "were immaterial, irrelevant and in no way affecting the issue, and not the subject of an indictment." The court denied the request.

William F. Kintzing for appellant. The court erred in disallowing the demurrer, for the reason that chapter 678 of the Laws of 1869, allowing defendant to testify, was and is unconstitutional, and the defendant was not, therefore, a competent witness. (Constitution, art. 1, § 6; *Erben v. Lorillard*, 19 N. Y. 299; *People v. Gordon*, 33 id. 508; *People v. Hovey*, 92 id. 554; *People v. Ruloff*, 45 id. 213, 221; *Connors v. People*, 50 id. 240, 242, 243.) The court erred in refusing to allow the demurrer to the indictment, upon the further ground that the testimony alleged to have been false was not material to the issue. (3 Institutes, 164; Coke [3 Inst. O. 74]; 1 Hawkins' P. C. 429; 1 Wharton's Am. Crim. Law [7th ed.], § 2198; 2 Bishop's Crim. Law [7th ed.], § 1030; 2 Wharton's Am. Law [7th ed.], § 2226; 2 Russell on Crimes [3d Eng. ed.], 596; 4 Blackst. Com. 137; 1 Gabbet's Crim. Law, 791; 1 Hume's Crim. Law [2d ed.], 360; 1 Allison's Crim. Law, 465; Bacon's Abr., title Perjury;

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2 Russell on Crimes [6th Am. ed.], 600; *Campbell v. People*, 8 Wend. 636; *Bullock v. Koon*, 4 id. 531; *Hinch v. State*, 2 Mo. 158; *Comm. v. Knight*, 12 Mass. 274; *Comm. v. Ward*, 116 id. 17; *Gibson v. State*, 44 Ala. 17; *Hood v. State*, id. 81; *State v. Aikens*, 23 Iowa, 403; *State v. Flagg*, 25 Ind. 243; *State v. Trask*, 42 Vt. 152; *Nelson v. State*, 47 Miss. 621; *Galloway v. State*, 29 Ind. 442; *State v. Hobbs*, 40 N. H. 229; *Hembree v. State*, 52 Ga. 242; *State v. Bailey*, 34 Mo. 350; *Comm. v. Smith*, 11 Allen, 243; *State v. Hathaway*, 2 N. & M. 113; *Connor v. Comm.*, 2 Virginia Cases, 30; *Reg. v. Owen*, 6 Cox's Cr. Cas. 105; *Rea v. Naylor*, 11 id. 13; *Reg. v. Murray*, 1 F. & F. 80; *Rea v. Griep*, 1 Ld. Raym. 258; 12 Moo. 159; *Rea v. Muscot*, 10 Mod. 195; *Rea v. Dunston*, Ry. & Moo. 109; *Rea v. Nicholl*, 1 B. & A. 21; *Reg. v. Bartholemew*, 1 C. & K. 366; *Reg. v. Manton*, Palmer, 382; *Reg. v. Lavey*, 3 C. & K. 26; 5 Cox's Cr. Cas. 259; *Rea v. Morton*, 6 C. & P. 562; *Rea v. Robbins*, 2 M. & R. 512; *Rea v. Alsop*, 11 Cox's Cr. Cas. 264; *Reg. v. State*, 12 id. 7; *Reg. v. Harvey*, 8 id. 99; *Reg. v. Berry*, id. 121; *Reg. v. Townsend*, 10 id. 156; *Reg. v. Ball*, 6 id. 360; 2 Bishop on Crim. Law, § 1038 [7th ed.]; *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 id. 240; *People v. Casey*, 72 id. 393; *People v. Brown*, id. 574; *People v. Crapo*, 76 id. 290.) The judgment herein should be reversed and defendant discharged. (Code of Crim. Pro., § 545.)

John Vincent for respondent. The line of cross-examination pursued in this case, and which brought out the statements upon which the several assignments of perjury are herein predicated, is expressly authorized. (Penal Code, § 714.) The evidence was material, as it went to the credibility of the witness, who was at the time testifying on his own behalf, and the people on his cross-examination had the right to an answer to any question relevant to the conviction, for the purpose of affecting the weight of his testimony. (Hawkins' Pl. Cr., b. 1, chap. 69; *United States v. Landsburg*, MSS. Op.; Archb. Prac. and Pleas, 817; *Reg. v. Gibbens*, 9 Cox's Cr. Cas. 108)

The Law of 1869 (Chap. 678) is constitutional. (1 Sup. U. S. R. S., chap. 37; *People v. Brandon*, 42 N. Y. 265; *People v. Comm'rs*, 50 id. 252.)

ANDREWS, J. The argument in support of the demurrer to the indictment rests upon three propositions: *first*, that by section 6, article 1 of the Constitution, no person can be compelled in a criminal case to be a witness against himself; *second*, that the act chapter 678 of the Laws of 1869, violates this constitutional provision; and *third*, that false swearing on the trial of an indictment, by the party indicted, on his examination, under the act of 1869, is not, therefore, legal perjury.

Whether the conclusion is a logical or legal deduction from the premises, need not be considered, for the reason that the minor premise is not well founded. The act of 1869 is permissive, and not compulsory. It permits a person charged with crime to be a witness in his own behalf. But it does not compel him to testify, nor does it permit the prosecution to call him as a witness. He can be sworn only at his election, and the statute declares that his omission or refusal to testify shall create no presumption against him. The policy of the act of 1869 has been criticised in some cases in this court. But the policy or propriety of a law is a legislative, and not a judicial question. The supposed moral coercion upon a person accused of crime to offer himself as a witness by reason of the adverse inference which might be drawn from his omission to testify, when presumably all the facts are known to him, is not compulsion within the meaning of the Constitution.

The Constitution primarily refers to compulsion exercised through the process of the courts, or through laws acting directly upon the party, and has no reference to an indirect and argumentative pressure such as is claimed is exerted by the statute of 1869. A law which, while permitting a person accused of crime to be a witness in his own behalf, should at the same time authorize a presumption of guilt from his omission to testify, would be a law adjudging guilt without evidence, and while it might not be obnoxious to the constitu-

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tional provision against compelling a party in a criminal case to be a witness against himself, would be a law reversing the presumption of innocence, and would violate fundamental principles, binding alike upon the legislature and the courts. The act of 1869 expressly precludes such a presumption from the silence of the accused, and while it may be difficult for a jury in many cases to exclude the inference of guilt from an omission of a defendant to be sworn, we cannot assume that it may not be done. The statute assumes it to be possible, and we cannot say, judicially, that such assumption is unfounded. The demurrer was, therefore, properly overruled.

The only remaining question worthy of notice arises on the motion of the prisoner's counsel on the trial that the court should direct an acquittal on the ground that the matters on which the perjury was assigned were immaterial. It is true that the false testimony did not bear directly upon the main issue on the trial for forgery, but only upon the credit of the witness who gave material evidence on the merits. Evidence going to the credit of a witness who has given material evidence is relevant, because it helps the jury in determining the main issue. The recent cases sustain the view that perjury may be assigned upon false testimony, going to the credit of a witness. (*Reg. v. Glover* 9 Cox's Crim. Cas. 501; *Reg. v. Lavey*, 3 C. & K. 26; Arch. Crim. Pr. 817.) False swearing in respect to such matter is not distinguishable in respect to moral turpitude from false swearing upon the merits, and, we think, there is no just reason for refusing to treat false swearing as perjury whenever the testimony is relevant to the case, although it may not directly bear upon the issue to be found. The questions are carefully considered in the opinions at General Term, and further elaboration is unnecessary.

The judgment should be affirmed.

All concur.

Judgment affirmed.

NELSON B. KILMER, for Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

An appellant is simply bound to present his case to the General Term upon the case as settled, and to this court upon the same record; he is not bound to print matter proposed by the respondent as an amendment to the case but disallowed by the trial judge.

Plaintiff, the appellant herein, in his proposed case set forth portions of certain tariffs and schedules, prepared and issued by defendant, which were exhibits on the trial; the portions omitted were not referred to on the trial, and in the opinion of the trial judge were not material. Defendant proposed as an amendment that the whole of the exhibits should be inserted. Said judge in settling the case disallowed the amendment, but required plaintiff to paste the exhibits in the appeal-book, if copies were furnished by defendant, or in lieu thereof that the original exhibits might be referred to on the argument. Defendant furnished the copies. On motion by defendant that plaintiff be required to print the exhibits as part of the return to this court plaintiff offered to attach copies to the appeal-book, if furnished by defendant. *Held*, that he should not be required to do more; that the order of the trial judge held good until the final determination of the action.

It seems, that such a practice is not to be encouraged, but as the permission to bring in the exhibits was in favor of respondent he could not complain.

(Argued January 15, 1884; decided January 22, 1884.)

THIS was a motion to compel appellant to print certain papers, which were exhibits on the trial, as part of the return to this court.

The facts are stated in the opinion.

Frank Loomis for motion.

Charles B. Meyer opposed.

DANFORTH, J. The plaintiff failed to recover, and in the case prepared for his appeal set out such portions of certain exhibits as he thought material, and as had been referred to on the trial. The defendant proposed as an amendment that the whole of the exhibits should be inserted. The trial judge dis-

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allowed the amendment, but in settling the case required the appellant to paste the exhibits in the appeal-book, if copies were furnished by the defendant, or in lieu thereof, directed that the original exhibits might be referred to on the argument by either party. The defendant furnished copies for the General Term, and the decision of that court being appealed from, now moves that the plaintiff print those exhibits as part of the return to this court. The plaintiff offered to attach them to the appeal-books if copies were furnished by the defendant.

He should not be required to do more. The order of the trial judge holds good until the final determination of the case. The papers in question are shown to be printed tariffs and schedules, prepared and issued by the defendant, full of figures and matter, which, in the opinion of the trial judge, were not material upon the trial, and to which it is said no reference was made by the respondent in the court below. The appellant was bound to present his case to the General Term upon the case as settled, and to this court upon the same record. It appears that the return actually on file accords with this rule, and the appellant is under no obligation to print matter proposed by the respondent as an amendment, but disallowed by the trial judge.

No doubt there is a difficulty growing out of the fact that, while the trial judge refused to introduce the exhibits into the case, he allowed them to be referred to by either party on the argument of the appeal, and the record will not show whether any part was so referred to. This practice might easily lead to embarrassment, and is not to be encouraged. But in this case it is in favor of the respondent, and complaint by him is without merit.

The motion should, therefore, be denied, with \$10 costs.
All concur.

Motion denied.

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In the Matter of the Application of DAVID A. PAUL for a
Writ of Habeas Corpus.

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The words "tenement-houses" in the title of the act entitled "An act to improve the public health in the city of New York by prohibiting the manufacture of cigars and preparation of tobacco in any form in the tenement-houses of said city" (Chap. 93, Laws of 1883), refer to a distinct class of houses recognized and defined by law, and the subject of the act as expressed in the title is limited to that class of buildings.

The subject of the section of said act (§ 1) prohibiting the manufacture of cigars or preparation of tobacco "in any rooms or apartments which in the city of New York are used as dwellings, for the purpose of living, sleeping or doing any household work therein," is not embraced in the title; its inclusion, therefore, in the act is violative of the provision of the State Constitution (Art. 3, § 16) declaring that no private or local bill "shall embrace more than one subject, and that shall be expressed in the title," and said section is void.

The court has no power to change and narrow the terms of an act for the purpose of bringing its subject within the title, and so saving it from the constitutional objection.

It seems that, striking out said section, the act does not prohibit the manufacture of cigars or preparation of tobacco in tenement-houses; the only other prohibition is (§ 2) against the use "for dwelling purposes" of "any part of any floor of any tenement-house" where such manufacture or preparation is carried on.

(Argued December 6, 1883; decided January 29, 1884.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 19, 1883, which affirmed an order of Special Term, granted upon a hearing on return to a writ of *habeas corpus*, which remanded the petitioner to custody.

The facts pertinent to the questions presented are stated in the opinion.

William M. Evarts for appellant. Chapter 93, Laws of 1883, authorizes such an interference with personal freedom and private property as is forbidden by section 6 of article 1 of the Constitution of the State. (*People v. Otis*, 90 N. Y. 52; *Fertilizing Co. v. Hyde*, 97 U. S. 659-661; *Slaughter-House*

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Cases, 16 Wall. 62; *Rockwell v. Nearin*, 35 N. Y. 302; *Wynehamer v. People*, 13 id. 378; *Craig v. Klein*, 65 Penn. St. 399; *Herdic v. Young*, 5 P. F. Smith, 176; *Thorpe v. Rutland*, 27 Vt. 149; *City of St. Louis v. Fitz*, 53 Mo. 582.) The courts have a right to protect the individual from unwarrantable interference with his property under the pretense of the exercise of the police power. (*Wynehamer v. People*, 13 N. Y. 278; *Coe v. Schultz*, 47 Barb. 64; *Rockwell v. Nearin*, 35 N. Y. 302; *Thorpe v. Rutland*, 27 Vt. 149; *Craig v. Klein*, 65 Penn. St. 399; *Herdic v. Young*, 5 P. F. Smith, 176; *Austin v. Murray*, 16 Pick. 126; *Greene v. Savannah*, 6 Ga. 1; *People v. Hawley*, 3 Pick. 330; *Ames v. County*, 11 Mich. 139; *Vanderbilt v. Adams*, 1 Cowen, 349; *Watertown v. Mayo*, 109 Mass. 315-319; *Town of Lake View v. Rose Hill Co.*, 70 Ill. 191). The act of 1883 is in contravention of section 19, article 1 of the Federal Constitution in that it impairs the obligation of contracts. (*Wynehamer v. People*, 13 N. Y. 371.) The act is local and embraces more than one subject. (§ 16, art. 3 of the Constitution; *Gaskin v. Meek*, 8 Abb. Pr. [N. S.] 312; *People v. O'Brien*, 39 N. Y. 132.) The court will look at the act and not at its title to determine whether it encroaches upon rights and privileges secured by the Constitution. (16 Wall. 39, 88, 97, 105, 111, 116, 119, 122.) The right and privilege of the relator to pursue his trade, and to order the employment of his family therein in his own house, was a valuable right and privilege in the sense of natural and inalienable right, and in the sense of article 1, section 1 of the Constitution, as well as in the sense of "liberty and property," as used in section 6 of the same article. (Smith's *Wealth of Nations*, b. 1, chap. 10, pt. 2; *Edict of Louis XVI*, 1776; 2 *Kent's Commentaries*, 1, 8; *Bertholf v. O'Reilly*, 74 N. Y. 515; *Wynehamer Case*, 13 id. 420; *Live Stock, etc., Ass'n v. Crescent City, etc., Co.*, 1 Abb. [U. S.] 398; 16 Wall. 106; *Corfield v. Coryell*, 4 Wash. C. C. 380; *Mayor, etc., v. Thorne*, 7 Paige, 263.)

Samuel Hand for respondent. Whether or not the manu-

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facturing of cigars or preparation of tobacco in any form in tenement-houses in the city of New York is prejudicial to the public health and the prohibition thereof expedient, is a question solely for the legislature, and it will not be reviewed by the courts. (2 Kent's Com. [Holmes' 12th ed.] 340; *Bertholf v. O'Reilly*, 74 N. Y. 509, 514, 515, 520, 521, 522, 523, 524; *The Slaughter-House Cases*, 16 Wall. 36; *Vanderbilt v. Adams*, 7 Cow. 349; *Stuyvesant v. Mayor*, id. 585; *Phelps v. Racey*, 60 N. Y. 10, 14; *City of New York v. Miln*, 11 Peters, 102; *Cronin v. People*, 82 N. Y. 323; 2 Kent's Com. 340 [Holmes' 12th ed.]; Cooley on Const. Lim. [5th ed.] 739, 743, 744, 745; Potter's Dwaris on Stat. 444; Dillon on Mun. Corp., § 95.) The exercise of the police power of the State and its power of eminent domain are distinct powers and differ substantially in their essence, and the constitutional conditions as to their exercise. (*Cooper v. Shultz*, 32 How. 107-121; *Coe v. Shultz*, 47 Barb. 64-70; Cooley on Const. Lim. [5th ed.] 707; Potter's Dwaris on Stat. 463; Dillon on Mun. Corp., § 93; Sedgwick on Const. Law, 423; *State v. Blake*, 36 N. J. Law, 442-447; *Gordon v. Cornes*, 47 N. Y. 608, 611; *People v. Mayor*, 3 Comst. 419; *Darlington v. Mayor, etc.*, 31 N. Y. 190; *B'k of Rome v. Vil. of Rome*, 18 id. 38, 43; *Wynehamer v. People*, 3 Kern. 378; *Bridgeport v. H. R. R. Co.*, 5 Conn. 475; *Clarke v. Rochester*, 24 Barb. 474; *Metropolitan B'd of Excise v. Barrie*, 34 N. Y. 657, 666.) The question of expediency in cases of eminent domain is purely a legislative and not a judicial one. (*In re Townsend*, 39 N. Y. 171-174; *People v. Smith*, 21 id. 595, 598; *Lindenmuller v. People*, 33 Barb. 548, 575; *Neuendorff v. Duryea*, 69 N. Y. 557, 563; *Coates v. Mayor, etc.*, 7 Cow. 585; *Martin v. Mott*, 12 Wheat. 19.) The courts never declare acts of the legislature void and unconstitutional except they be clearly so. (*People v. Allen*, 42 N. Y. 378, 381; *People v. Sup'rs of Orange Co.*, 17 id. 235, 241; *Met. B'd of Excise v. Barrie*, 34 id. 657, 668; *Bloomfield v. Richardson*, 63 Barb. 437, 450; Mills on Eminent Domain, § 10; *W. P. Inst. v. E. R. R.*, 79 Penn. St. 257; *S. R. R. v. Stockton*, 41 Cal. 147; *Pittsburg v. Scott*,

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1 Penn. St. 309; *Ex parte Smith v. Keating*, 38 Cal. 702, 709; *Ex parte DeLancey*, 43 id. 478; *The Intendant, etc., v. Chandler*, 6 Ala. 899, 902; *St. Paul v. Colters*, 12 Minn. 41, 48; *St. Louis v. Webber*, 44 Mo. 547, 550; *Paxon v. Sweet*, 1 Green [N. J.], 196; *City of Brooklyn v. Breslin*, 57 N. Y. 591, 596; *People v. Mayor*, 32 Barb. 102; *B. & N. R. R. Co. v. Buffalo*, 5 Hill, 209, 211; *People v. B'd of Aldermen*, 11 Abb. Pr. 289; *N. Y. & H. R. R. Co. v. Mayor*, 1 Hilt. 562; *Schanck v. Mayor*, 10 Hun, 124; 69 N. Y. 444; *Brinkmayer v. Evansville*, 29 Ind. 187; *Brewster v. City of Davenport*, 51 Iowa, 428; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *City Council v. Goldsmith*, 2 Spears [S. C.], 428; *Hill v. Charlotte*, 72 N. C. 55; *Fisher v. Harrisburg*, 2 Grant's [Penn.] Cases, 291; *Baker v. Boston*, 12 Pick. 184; *Commw. v. Robertson*, 5 Cush. 338.) The act of 1883 is not unconstitutional as in contravention of section 10, article 1 of the Federal Constitution; it does not impair the obligation of contracts; nor does it violate article 5 of the amendments to the said Constitution; it does not deprive any one of property without due process of law; nor does it take private property for public use without due, just compensation. (*Vanderbilt v. Adams*, 7 Cow. 349; *In re Ryer*, 72 N. Y. 1, 7; *Stuyvesant v. Mayor*, 7 Cow. 585; Cooley on Const. Lim. [5th ed.] 710; *Lindenmuller Case*, 33 Barb. 548, 577; *Met. B'd of Excise v. Barrie*, 34 N. Y. 657, 667, 668; *Neuendorf v. Duryea*, 69 N. Y. 557, 563; *Beer Co. v. Massachusetts*, 97 U. S. 25.) The act is not violative of section 16, article 3 of the Constitution of this State. It embraces only one subject, the protection of the public health against dangers arising from the manufacture of cigars and the preparation of tobacco in tenement-houses in New York city. (*Tift v. City of Buffalo*, 82 N. Y. 204, 211; *In re Volkening*, 52 id. 650; *In re Mayor*, 50 id. 504; *Harris v. People*, 59 id. 599; *Village of Gloversville v. Howell*, 70 id. 287, 290; *Matter of L. and W. Orphan Home*, 92 id. 116, 120; *In re Village of Middletown*, 82 id. 196, 202-204; *People, ex rel. City of Rochester, v. Briggs*, 50 id. 553, 565,

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566; *Kerrigan v. Force*, 68 id. 381, 383, 384; *In re Met. Gas Co.*, 85 id. 526; *In re Ketchum*, 31 How. Pr. 346, 347-352; Cooley on Const. Lim. [5th ed.] 211, 212; *In re Ryer*, 72 N. Y. 1, 2, 3.)

FINCH, J. The relator was arrested upon a warrant issued by a police justice of the city of New York, which recited an accusation upon sworn information that "David A. Paul committed the crime of manufacturing cigars and preparing tobacco in the house No. 375 East Eighth street, the same being a tenement-house, occupied by more than three families living independent of one another therein, in rooms in said tenement-house, which at the time were occupied by said David A. Paul and his family as a dwelling for the purpose of living, sleeping and the doing of household work; said rooms or apartments being on the east or right hand section of the fourth floor in said tenement-house, adjoining each other in a contiguous line from the windows opening into the street to the windows opening into the yard of said tenement-house." The precise offense charged is somewhat obscured by the words describing the character of the house and the location of the rooms, but is nevertheless a specific accusation of manufacturing cigars in a room or rooms, which room or rooms were at the same time used as living or household rooms. In other words, the charge asserts the co-existence at the same time and in the same room or rooms of cigar manufacturing and household use.

Precisely this offense is described in the first section of the act under which the prosecution was instituted. (Laws of 1883, chap. 93.) That section reads: "The manufacture of cigars or preparation of tobacco in any form in any rooms or apartments, which in the city of New York are used as dwellings for the purpose of living, sleeping or doing any household work therein is hereby prohibited." The scope of this section seems quite clear. It is not so broad as it appeared to us on the argument. It does not forbid the manufacture of cigars in a dwelling-house. It forbids it only in such *rooms* or *apartments* within the house as are at the same time used for the purpose of "living,

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sleeping or doing any household work therein." So that, under this section, in any dwelling-house, the same room or apartment must not at the same time be used for cigar making and for family purposes. But the owner or occupant of a house may manufacture cigars in one or more rooms therein, provided that he uses them for no household purposes, and separates completely the domestic from the business uses. The prohibition is aimed entirely at the co-existence of the cigar making and the sleeping or living of the family in the same room or apartment. If they are kept separate, and in separate and distinct apartments, it is no offense under this first section that the business use and the domestic use go on under the same roof, or in the same house.

That the relator did not preserve such separation is the gist of the charge in the warrant. It accuses him of manufacturing cigars "in rooms" which "at the time" "were occupied" by him and his family "for the purpose of living, sleeping and the doing of household work." Just this offense was charged in the information. The deposition of the complainant averred that Paul manufactured cigars "in rooms or apartments" which "were then and there used by the said David A. Paul as a dwelling for the purpose of living and sleeping and doing household work therein." So that the complaint and the warrant alike charged the offense described in section one.

But upon the hearing before the magistrate the complainant was examined as required by law. (Code of Crim. Proc., § 194.) The witness was cross-examined on behalf of the defendant. (§ 195.) The examination was signed by the witness and certified by the magistrate, and is before us, returned as part of the record. It tended to show that an offense had been committed under section 1, and that there was probable cause for believing the relator guilty of violating that section. After describing the location of the rooms as consisting of four, extending through from front to rear, the two middle rooms occupied as bed-rooms and the rear room as a kitchen, which left the front room capable of use as a sitting or living room, he said, "there are residents in front facing the street, and re-

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siders in the rear facing the yard." Other statements tended in the same direction, and, while the evidence was weak and lacked precision, there was enough to call into play the discretion and judgment of the magistrate. He held the prisoner for trial. Presumably the commitment was upon the charge made by the complainant, stated in the warrant, and investigated upon the hearing. But two facts make it possible that such presumption is ill-founded. The magistrate apparently had authority to issue process of commitment for a crime developed on the examination, although not charged in the original warrant (Code of Crim. Pro., § 208); and the evidence tended to prove a violation of section 2 of the act. The magistrate might have held the prisoner, therefore, for a violation of either section, or of both. But if not satisfied by the evidence that section 2 had been probably violated, and yet of opinion that section 1 had been, he was at liberty to commit the prisoner for a violation of section 1 only, which was precisely the crime charged in the complaint and warrant of arrest. That is exactly what the magistrate did. To be quite sure of it requires an analysis of section 2.

That provides that "no part of any section of any floor in any tenement-house in the city of New York, in which the manufacture of cigars or the preparation of tobacco is carried on, *shall be used for dwelling purposes.*" There is no mistaking what is not, and what is the misdemeanor here prohibited. It is not the manufacture of cigars in the tenement-house, or the room therein devoted to that purpose. That is not prohibited. On the contrary the section treats it as a lawful and proper trade, lawfully carried on in the locality adopted. The prohibition and the crime consists in one of two things, viz.: either in beginning an occupation for family use of the three rooms in the present case, where the front room was already occupied for cigar making; or in continuing the family use of three rooms, after the front room had become a cigar manufactory. The person guilty of this somewhat novel crime might or might not be the cigar maker himself. If Paul had rented the front room and began his manufacture, and then a

third person had moved his family into the three rooms, that third person would have been the criminal and not Paul. The latter could not have been lawfully arrested, nor his honest pursuit of a lawful trade interfered with. If Paul himself moved his family into the three rooms he could have been arrested, but for that offense and that only. His crime would not have been the manufacture of cigars in the house, for no law forbade; nor in the room selected, for that too was lawful; but would have been the entirely distinct and separate act of moving his family into three rooms notwithstanding his lawful manufacture in the front room. It becomes thus apparent, that under the act of 1883 the manufacture of cigars never violates its terms and never becomes a crime, save in the single instance named in the first section, where it is carried on in the room or rooms used at the same time for family purposes.

Turning now to the commitment to see for what offense the prisoner was held for trial we find it to be "willfully violating chapter 93 of the Laws of 1883, of the State of New York, *in manufacturing cigars*, at and within a tenement-house at 375 East Eighth street in said city." The warrant of commitment is required to state briefly the nature of the crime. (Code of Crim. Pro., § 214.) This warrant does so, making every allowance for brevity; it does not state any offense under the second section, since the manufacture of cigars is in no case under that section a crime; but it does state one, and the only one which can possibly answer that description under the first section. As it was of such offense that the prisoner was accused and for such offense that he was arrested, and the commitment describes that and no other, we cannot say that he was arrested for one crime and committed for another. If that were true the warrant of commitment should at least have briefly stated what that new and distinct offense was; the nature of the crime. It thus appears that the relator is held for violation of section 1, and that alone. Why the magistrate did not determine that section 2 had been violated we may not inquire. Even if both the complaint and warrant of arrest may be read as charging such a violation, which is difficult, but perhaps not

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wholly impossible, there is no ambiguity in the warrant of commitment. It holds the prisoner for a criminal manufacture of cigars, and no such offense exists under section 2.

It is then claimed on the part of the appellant, that at least x section 1 is unconstitutional because of a defect in the title of the act within the provisions of section 16, article 3 of the Constitution of the State. The title of the act is, "An act to improve the public health in the city of New York, by prohibiting the manufacture of cigars and preparation of tobacco in any form, in the tenement-houses of said city." It is not denied that the act is "local," since its operation is limited to the city of New York; and being such it is said that it relates to two distinct subjects, only one of which is mentioned in the title. We think the objection is well founded. The subject referred to in the title is the manufacture of cigars in tenement-houses. These houses, as a known and distinct class, are recognized and defined by law. (Laws of 1873, chap. 385; Sanitary Code of N. Y., § 3.) They are apt to be ill-ventilated, unclean and packed full of inmates, and to become centers or radiating points of contagious disease. As such they might be the proper subjects of sanitary regulation in the interest of the public health. To such regulation in one specific respect the title of the bill fairly relates, but no one would suspect from such title that the bill also undertook to regulate the occupation of every dwelling house in the city. / Two new † crimes are created by the act. One of them has relation to the tenement-houses alone; the other to the dwellings of the whole city. One of them is committed by a mode of occupying rooms in a tenement-house; the other by manufacturing cigars in any family rooms. The two offenses are unlike, different, and entirely distinct and separate. The latter is not at all stated in the title, because that is narrowed so that it does not embrace it. Practically, the limited and specific title confined entirely to tenement-houses, a class of buildings known to, and defined by the law, operated as a fraud and deception upon the people of the city. In *Harris v. People* (59 + N. Y. 600) citing also *People v. Supervisors of Chautauqua* SICKELS — VOL. XLIX. 64

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(43 id. 10) it was declared to be one definite purpose of the constitutional provision to advise the public, and the locality, and the representatives of the locality and of other parts of the general purpose of the bill, so that those interested might be on their guard as to the whole or as to the details of the bill. The citizens of New York, jealous of interference with their homes, reading the title of this bill, would be deceived, misled, and thrown off their guard. Assuming that the measure proposed related to the sanitary condition of crowded tenement-houses, each citizen would take no heed, and find in the end that his own dwelling-house had been regulated. The legislator who should judge of the bill by its title might deem it proper or harmless, and find too late that the period of objection or resistance was gone. If the law had borne a true and not a false label, warning would have been given. Where the title is such that it gives no hint of the real subject of the enactment; where it furnishes no particle of truthful information; and he who reads it is not bound to know or suspect that the actual enactment does or may exist; and where, as a consequence, the title is misleading and deceptive, it is safe and right to apply the constitutional prohibition. Most of the cases in which the question has arisen have been the precise reverse of the one before us. They have been those in which the title was so broad and general that a multitude of various details could be fairly deemed embraced within it. Of this character have been titles to legalize certain proceedings; in relation to certain contracts or local improvements, and to organize or amend the charters of municipal corporations. (*Tift v. City of Buffalo*, 82 N. Y. 211; *In re Volkening*, 52 id. 650; *Village of Gloversville v. Howell*, 70 id. 290; *In re Mayer*, 50 id. 505; *People, ex rel. City of Rochester, v. Briggs*, id. 553; *Matter of L. & W. Orphan Home*, 92 id. 120; *Harris v. People*, 59 id. 600.) The title here is not broad, but narrow; not general but specific; not reasonable and fair but deceptive and misleading. Nobody would infer, and nobody was bound to imagine, that under a title relating to tenement-houses alone, there was enacted in the first section a law affecting not tenement-

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houses as such, but all the dwelling-houses in the city ; a law as to which the title not only did not relate, but by its narrow terms, affirmatively and positively excluded it. Nor is section 1 of the act before us saved by the doctrine which we have several times applied, that if a local act contains a subject which is properly expressed in the title it is valid as to that subject, although invalid as to a subject not expressed, for the doctrine applies only where there are two or more subjects, some expressed and some not expressed, while in section 1 there is but one subject, and that not expressed in the title at all. (*In re Sackett Street*, 74 N. Y. 103; *In re Van Antwerp*, 56 id. 261; *People, ex rel. City of Rochester, v. Briggs*, 50 id. 553.) Nor will it do to avoid the difficulty by saying that as the phrase "dwelling" includes within it tenement-house we may hold the section good as to a part of its meaning, and repudiate it as to the balance, for that in this case would be an act of legislation. It would require us to amend the section by striking out the general word "dwelling" and substituting the phrase "tenement-house," and then to hold the section good as amended by the court. The constitutional provision deals with the law itself as it came from the legislature. We cannot change and narrow its terms to save it. In the room of the subject plainly stated we cannot put one narrower and different in order to get it within the title. The section must stand or fall just as it was enacted, and without reference to extrinsic facts developed in cases under it. But all the reasons for holding it not within the title culminate in this, that such title not only failed to express the subject of the section, but by its frame and phrase expressly and affirmatively excluded that subject; for when it professed to relate to tenement-houses it substantially declared that it did not relate to dwelling-houses generally, which was precisely the one subject to which it did relate. Where the title thus deceives and misleads the constitutional provision should apply if it is ever to be enforced.

For this reason we hold section 1 to be unconstitutional, and that being so it follows that the relator is held for an al-

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leged crime which did not exist and which he could not commit, and that he should be discharged.

It is not necessary to consider further the effect of this conclusion upon the remaining sections of the act, nor the very grave and serious argument upon the question whether the act as a whole is within the police power of the State, and capable of being sustained under the Constitution. Those questions should be reserved for an occasion, if it shall arise, when their determination is essential and necessary to the conclusion to be reached.

The order appealed from should be reversed, and the relator discharged.

All concur.

Order accordingly.

WILLIAM B. SCOTT et al., Appellants, v. CHARLES MORGAN,
Respondent.

It is not the object of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court, and they cannot, therefore, be properly referred to to ascertain the grounds of decision.

Where, therefore, a case as settled stated the grounds upon which a motion to dismiss the complaint was made and granted, *held*, that this was controlling and respondent could not refer to the minutes, although incorporated in the record, to show that the motion was also based upon other grounds than those stated in the case.

But *held*, that respondent had the right, in support of the judgment, to urge any sufficient ground appearing from the record which he might have raised in the court below, provided it could not have been obviated had it been raised on the trial.

The provision of the Code of Civil Procedure (Subd. 3, § 708), declaring that a person who willfully conceals or withholds from the sheriff property which he has attached, but which has passed out of his hands, shall be liable to double damages "at the suit of the party aggrieved," gives to the attachment and execution creditor a right of action when aggrieved. As, however, the remedy thus given exists solely by force of the statute, it must be confined to the cases provided for, and can be resorted to only where injury has been occasioned to the creditor by such willful with-

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holding and concealment. Such an injury can only be shown by a return of the process unsatisfied.

The right of action also does not exist save where property has been once taken in execution by the sheriff, has passed out of his hands and he is unable to regain possession, and dispose of it under the authority conferred by the execution.

Where possession is regained, the statute does not give a remedy for an injury to the property while in possession of the wrong-doer.

It must appear also that the concealment and withholding was willful. One who dispossesses the sheriff under a claim of right, and detains the property under a belief that he has a superior title thereto, may not be made liable.

Where, therefore, the complaint in such an action failed to allege that the taking of the property by the defendant was willful, and plaintiff's counsel admitted in his opening on the trial that defendant acted as tax collector and by virtue of a levy under a tax warrant, by which he claimed to have acquired a right superior to that of the sheriff, and it also appeared from the complaint and the opening that after the alleged trespass by defendant, the sheriff regained possession and sold the property under his process; *held*, that the complaint was properly dismissed.

(Argued December 18, 1883; decided January 29, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 14, 1880, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.

The complaint in this action alleged the commencement of an action in plaintiff's favor against one Bonner, the issuing of an attachment therein and the levy thereof upon certain specified property of the attachment debtor; the recovery of judgment in said action and the issuing of execution thereon to the sheriff, and the advertisement by him for sale of the property levied on, on February 23, 1878. The complaint then averred that on or about the day advertised for such sale, defendant wrongfully took, from the possession of the sheriff, removed and converted to his own use the said property; that on March 6, 1878, defendant returned the property to the sheriff, but that the same, while in defendant's possession, and by such unlawful removal and retention, was injured and damaged; that

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said property was, thereafter, sold by the sheriff, but in consequence of such injuries did not bring so large a price as it would have done, and that the avails of the sales were insufficient to satisfy the execution, and the balance thereof remaining, after applying such proceeds, remains unpaid.

The further material facts appear in the opinion.

Henry P. Starbuck for appellants. An action lies in the name of an attachment and execution creditor against a wrongdoer for interfering with property held by the sheriff under the attachment and execution. (Code of Civil Procedure, § 708, subd. 3.) By the levy of his attachment the plaintiff acquires a conditional specific lien upon the goods attached as security for his debt. This lien is perfected and made absolute by the subsequent judgment and execution. (*Rinchey v. Stryker*, 23 N. Y. 45-54; *Frost v. Mott*, 34 id. 253-255; *Thurber v. Blanck*, 50 id. 80-83-86; *Drake on Attachment*, §§ 224, 224a; *M. and T. Bank v. Dakin*, 51 N. Y. 515-524; *Crippen v. Hudson*, 13 id. 161-166; *Green v. Burke*, 23 Wend. 490-498; *People v. Hopson*, 1 Denio, 574-578.) By the wrongful act of the defendant not only has the plaintiff's security or lien for his debt been diminished in value, but the debt itself has been *pro tanto* satisfied and lost as between the plaintiff and his debtor in the attachment and execution. (*Mickles v. Haskin*, 11 Wend. 125; *Holbrook v. Champlin*, 1 Hoff. 149; *Green v. Burke*, 23 Wend. 490; *Ostrander v. Walter*, 2 Hill, 329; *People v. Hopson*, 1 Denio, 574-578; *Voorhees v. Gros*, 3 How. 262; *Waddell v. Elmendorf*, 5 Denio, 447; *Peck v. Tiffany*, 2 N. Y. 451; *Radde v. Whitney*, 4 E. D. Smith, 378; *Ex parte Lawrence*, 4 Cow. 417; *Jackson v. Bowen*, 7 id. 13; *Wood v. Torrey*, 6 Wend. 562; *People v. Onondaga C. P.*, 19 id. 79; *Hayden v. Agent of State Prison*, 1 Sandf. Ch. 195; *Ladd v. Blunt*, 4 Mass. 402; *Hoyt v. Hudson*, 12 Johns. 207; *Shepard v. Rowe*, 14 Wend. 260; *Miller v. Adsit*, 16 id. 335, 349, 350; *People v. Reeder*, 25 N. Y. 302-304; *Howland v. Willetts*, 9 id. 170.) It is the plaintiff, and not the sheriff, in whose name actions lie to subject property to the

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levy of an execution. (*McElwain v. Willis*, 9 Wend. 548; *O'Brien v. Glenville Woolen Co.*, 50 N. Y. 128; *M. and T. Bank v. Dakin*, 51 id. 519, 525.) Sections 655, 677 and 679 of the Code, which provide for the collection by the sheriff of choses in action attached, and for his obtaining possession of property attached, concern "such actions only as might be commenced in the name of the defendant" in the attachment, and relate strictly to the enforcement of the possessory rights of the sheriff acquired by the writ. (*Thurber v. Blanck*, 50 N. Y. 80-86; Bliss's Annotated Code, § 677, note; Throop's Code, § 677, note.) The liability of the sheriff to the plaintiff depends upon the question of negligence. He is responsible for such care only as a prudent man would take of his own property. (*Moore v. Westervelt*, 27 N. Y. 234.) It is no objection to the plaintiff's action to say that the defendant may also be sued by the sheriff; for a recovery by the sheriff would be a bar to the plaintiff's recovery, and, *vice versa*, a recovery by the plaintiff would be a bar to the sheriff's recovery so far as the plaintiff is concerned. (*Mynn v. Coughton*, Cro. Car. 109; *Lynne v. Coningham*, Hetley, 95; *Cougham's Case*, Hutton, 98; *Wheatley v. Stone*, Hobart, 180.) The action lay in favor of the plaintiff and against the defendant at common law. (Fitzherbert's *Natura Brevium*, 102; *Kent v. Keilway*, Lane, 70; *S. C.*, Jenk. 282, Ca. X; *Mynn v. Coughton*, Cro. Car. 109; *Lynne v. Coningham*, Hetley, 95; *Cougham's Case*, Hutton, 98; *Wheatley v. Stone*, Hobart, 180; *Esp. N. P.* 610; *Sheather v. Holt*, Strange, 531.) An action on the case also lay in the name of the plaintiff against the wrong-doer for interfering, as in the case at bar, with goods taken by the sheriff in execution. (*Sheriff of Surrey v. Alderton*, Hetley, 145; *S. C.*, Lit. 296; Bacon's Abridg., title *Rescue*, A; *Lynne v. Coningham*, Hetley, 95; *Yate & Alexander's Case*, Godbolt, 284; *Smith v. Tonstall*, Carth. 3; *Adams v. Paige & Grant*, 7 Pick. 542.) As the case as settled stated the general grounds of motion to dismiss the complaint it was controlling, and the clerk's minutes could not be resorted to, although incorporated in the record. (*Willis v. De Forrest*, 16 Barb. 61; Code of Civil

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Procedure, § 490; *Lounsbury v. Purdy*, 18 N. Y. 515; *Shotwell v. Mali*, 38 Barb. 445; *Binsse v. Wood*, 37 N. Y. 526; *Mallory v. Trav. Ins. Co.*, 47 id. 52; *Thayer v. Marsh*, 75 id. 340; *Belknap v. Sealey*, 14 id. 143.) The point is one which could have been met by amendment if it had been raised. (*Gardner v. Heartt*, 3 Denio, 232; *Lounsbury v. Purdy*, 18 N. Y. 515; *Thayer v. Marsh*, 75 id. 340.) Such a point is not available before this court, either to reverse or sustain a judgment. (*Hofheimer v. Campbell*, 57 N. Y. 269; *Smith v. Bodine*, 74 id. 30; *Thayer v. Marsh*, 75 id. 340; *Cook v. Whipple*, 55 id. 150, 157.) The motion to dismiss is not like a demurrer in respect of being supported on appeal upon grounds not mentioned at the trial. (Code of Civil Procedure, § 497; *Englis v. Furniss*, 3 Abb. 82; *Brown v. Colie*, 1 E. D. Smith, 265, 270; *Gasper v. Adams*, 24 Barb. 287; *Williams v. Birch*, 6 Bosw. 674; *Star S. S. Co. v. Mitchell*, 1 Abb. [N. S.] 396.) It was not necessary to allege in the complaint the insolvency of Bonner. (*Bank of Rome v. Curtis*, 1 Hill, 275; *Pardee v. Robertson*, 6 id. 550; *Ledyard v. Jones*, 4 Sandf. 67; *S. C.*, 7 N. Y. 550; *Metcalf v. Stryker*, 10 Abb. 12; *S. C.*, 31 Barb. 62; *Wilson v. Gray*, 6 Mod. 211; *Jenk.* 311; *Bull. N. P.* 62 a.) A plaintiff cannot be said to suffer damage from the destruction of a lien as long as his debt still remains wholly due and collectible. (*Levy v. Mayor, etc., of N. Y.*, 3 Rob. 194; *Yates v. Joyce*, 11 Johns. 136; *Niagara Bank v. Roosevelt*, 9 Cow. 409-416; *Vandemark v. Schoonmaker*, 9 Hun, 16; *Lane v. Hitchcock*, 14 Johns. 213; *Gardner v. Heartt*, 3 Denio, 232; *Carpenter v. Man. Life Ins. Co.*, 22 Hun, 49; *Southworth v. Van Pelt*, 3 Barb. 347; *Van Pelt v. McGraw*, 4 N. Y. 110; *Manning v. Monaghan*, 23 id. 539.)

George J. Greenfield for respondent. The sheriff is the only proper person to bring this suit. (*Bowe v. Knick. L. Ins. Co.*, 27 How. 312; *Smith's Sheriffs and Constables*, 340-343; *People v. Ruder*, 25 N. Y. 302; *Browning v. Hanford*, 5 Denio, 580; *Cornell v. Dakin*, 38 N. Y. 253; *Moore v. Fargo*, 112

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Mass. 254; *Mair v. Bell*, 27 Wis. 517; *Ansonia B. & C. Co. v. Babbitt*, 74 N. Y. 400; *Crofut v. Brandt*, 58 id. 106; Story on Bailments, §§ 93, 125, 128, 129; Drake on Attachments, §§ 290, 297, note 2; 2 Hilliard on Torts, 254, § 47; *Ladd v. North*, 2 Mass. 514, 516; *Giles v. Grover*, 6 Bligh, 277, 290-295, 312-314, 322, 334, 335, 367, 368, 434-436, 453; 1 Walford on Parties to Actions, 164; 1 Wait's Law and Pr. 811; Crocker on Sheriffs, § 449; *Braley v. French*, 28 Vt. 546; *Skinner v. Stewart*, 39 Barb. 206; *Peck v. Tiffany*, 2 N. Y. 451; *Steffin v. Lockwood*, 17 W'kly Dig. 418; Gwynne on Sheriffs, 299; *Terwilliger v. Wheeler*, 35 Barb. 620; *Miller v. Adsit*, 16 Wend. 335; *Smith v. Reeves*, 33 How. 183, 191; *Van Brunt v. Scheneck*, 11 Johns. 377, 383; 1 Wait's Law and Pr. 812; *Sweezy v. Lott*, 21 N. Y. 481, 484; *Lupton v. Smith*, 3 Hun, 1; *Van Valkenburgh v. Bates*, 14 Abb. [N. S.] 314; *Thurber v. Blanck*, 50 N. Y. 80; *Hall v. Brooks*, 2 Civ. Pro. 198.) The objection that the defendant should have demurred to the complaint for non-joinder of the sheriff is not available, as the objection goes to the foundation of the action. Such objection is not waived by not demurring or pleading. (*Scofield v. Doscher*, 72 N. Y. 491, 495; *Goodyear D. T. Co. v. Fresselle*, 57 How. 255-257.) Where the cause of action itself is created by a statute which gives the double damages, it is essential that the complaint should contain such allegations as will notify plaintiff's adversary of his claim. (*Newcomb v. Butterfield*, 8 Johns. 342; *Livingston v. Platner*, 1 Cow. 175; *Brown v. Bristol*, id. 176; *Benton v. Dale*, id. 160; *Duncan v. Katon*, 6 Hun, 4; 64 N. Y. 625; *Terwilliger v. Wheeler*, 35 Barb. 620; Sedgwick on Damages, 633, 666, 667, 690.) This action cannot be sustained by plaintiffs as an action on the case for consequential damages to their lien under the attachment and execution. (*Gardner v. Heartt*, 3 Denio, 232; *Yates v. Joyce*, 11 Johns. 136; *Lane v. Hitchcock*, 14 id. 213; *Peterson v. Clark*, 15 Johns. 205; *Brookman v. Hamill*, 46 N. Y. 636; *Volkening v. DeGraaf*, 81 id. 268, 272.) By an amendment of the sheriff's return, an action may still be prosecuted against the defendant by the

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sheriff. (*Barker v. Binninger*, 4 Kern. 270.) Levy by attachment or execution not satisfaction. (*McBride v. Farmers' B'k*, 28 Barb. 476; 22 id. 522.) The objection that the action should be brought in the name of the sheriff is not an objection as to his legal capacity to sue and need not be taken by demurrer. (*Van Valkenburgh v. Bates*, 14 Abb. 459, 472; *Heffin v. Lockwood*, 17 Weekly Dig. 418; *Ansonia Brass & Copper Co. v. Pratt*, 10 Hun, 443, 445.)

RUGER, Ch. J. The complaint was dismissed upon the trial on the opening, upon the motion of the defendant, upon the ground that the "only remedy of the plaintiff was to sue the sheriff, and that no action would lie in favor of a judgment creditor against a third person for wrongful interference with property previously attached and levied upon by the sheriff."

The court granted the motion upon the ground above stated. The respondent now seeks to avail himself in support of the judgment of an additional ground for his motion appearing in the clerk's minutes printed as a part of the record, and which recites that said motion was made upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

We think the respondent cannot refer to such minutes, although incorporated in the judgment-roll, to enlarge the grounds upon which the motion to dismiss the complaint was predicated.

The case, as settled by the judge who presided at the trial, must be held to be controlling as to what took place at that time, and especially since he deliberately refused upon the settlement to incorporate in it the statement from the clerk's minutes as one of the grounds of the defendant's motion.

It is not the office of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court; and they cannot, therefore, be properly referred to for the purpose of ascertaining the grounds of decision.

So far, however, as the respondent is concerned, it is imma-

terial whether the ground stated in the minutes be regarded as having been taken upon the trial or not, since he has now the right in support of the judgment appealed from to do so upon any sufficient ground appearing in the record which he might have raised in the court below, provided it is such an objection as could not have been obviated upon the trial by the plaintiffs. (*Beckwith v. Whalen*, 5 Lans. 377; *Newcomb v. Clark*, 1 Denio, 226; *Palmer v. Lorillard*, 16 Johns. 348; *Allard v. Greasert*, 61 N. Y. 4; *Stevens v. Hyde*, 32 Barb. 171; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523).

Consequently if there existed a valid legal obstacle to a recovery by the plaintiff in the action, whether specified on the trial or not, the judgment must be sustained, if it was such an obstacle as could not have been removed by proof.

We are thus brought to the question whether a cause of action could have been maintained upon the facts appearing in the complaint, and the opening, at the time the motion to dismiss was granted.

Assuming for the purpose of the argument that a judgment creditor has a right of action against one who has dispossessed the sheriff of property seized upon execution, we think the complaint, nevertheless, lacks several allegations essential, both at common law and under the Code, to the statement of a good cause of action.

The following principles are deemed to be well established by the decisions of the courts of this State as the rule of the common law upon this subject. After such levy, the debtor, against whom the process issues, still remains the general owner of the property seized, and is entitled, by virtue of such ownership, to the benefit of its full value, either in its application in satisfaction of the claims of the creditor, to procure which the levy was made, or in case of a surplus resulting after such satisfaction, to a return of such surplus. (*Marsh v. White*, 3 Barb. 519.) He unquestionably has a right of action against any person unlawfully interfering with the property while in the possession of the sheriff, by which interference its

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value is impaired or diminished, and in consequence of which he is deprived of the benefit of its application in the payment of his debt, or the return of any portion to which he may be entitled.

This right of action is necessarily subordinate to the right of the sheriff to maintain an action to recover damages for a loss occasioned by an injury to his special interest in the property created by a levy and possession under legal process. (*Howland v. Willetts*, 9 N. Y. 173; *Ansonia Brass Co. v. Babbitt*, 74 id. 397; Story on Bailments, § 93, e. and note.)

Since from the very nature of such an action, any recovery by the sheriff inures to the advantage of the creditor issuing the process (*People v. Reeder*, 25 N. Y. 304; *Cornell v. Dakin*, 38 id. 259), obvious considerations of justice prevent the existence of a right of action in the creditor for the same injury. (*Barker v. Mathews*, 1 Denio, 335; *Peck v. Tiffany*, 2 N. Y. 451; *Browning v. Hanford*, 5 Denio, 594; 2 Hilliard on Torts, 254.) It is only through the statute that a creditor can directly enforce the application of his debtor's property to the payment of a judgment and execution, and for that purpose he can employ only those methods which are provided by the statute. (*Thurber v. Blanck*, 50 N. Y. 85.) The statute gives him no title to, or right in, the property, and the measure of his interest therein is the extent of the liability of the sheriff to pay over to him the proceeds realized from the sale or other disposition of the property, and is limited to the amount required to satisfy the execution. (*People v. Hopson*, 1 Denio, 578; *Swezey v. Lott*, 21 N. Y. 484; Story on Bailments, § 129 [8th ed.].) We thus arrive at the conclusion that the plaintiffs are not entitled to maintain this action unless such right is given to them by subdivision 3 of section 708 of the Code of Civil Procedure. This reads as follows: "If personal property attached, belonging to the defendant, has passed out of the hands of the sheriff, without having been sold or converted into money, and the attachment has not been discharged as to that property, he must, if practicable, regain possession thereof; and, for that purpose, he has all

of the authority which he had to seize the same under the warrant. A person who willfully conceals or withholds such property from him is liable to double damages at the suit of the party aggrieved." Notwithstanding the time which has elapsed since this enactment, we are not aware that it has received judicial construction, and are, therefore, compelled to regard it as an original question in our courts. It was originally adopted with slightly different phraseology among the amendments to the Code included in chapter 438 of the Laws of 1849, and was afterward incorporated into the Code of Civil Procedure in the language above recited.

It seems to be quite clear that the legislature intended thereby to create a new remedy for the injury referred to, and to give that remedy to parties not before entitled to it. The language employed seems plainly to import that other persons than the sheriff might be aggrieved by his being dispossessed of property seized by him under attachment and execution, and to contemplate an action in their behalf for the damages suffered in consequence thereof.

If it had been intended by this provision to give this right of action solely to any individual party, it would have been much simpler to have said so directly, and to have thus removed all question as to its meaning. It is also difficult to discover any reason why double damages should have been given to the sheriff for the wrong described, since his damages on account thereof would have been fully compensated by a recovery of the value of the property lost. Neither is it believed that it was thereby intended to give the right of action to the debtor alone, for he might be the very party offending against the statute, and against whom the action was authorized; and, so far as his rights of property are concerned, he already had, as we have seen, ample remedies to protect himself from loss or injury. We cannot, therefore, avoid the conclusion that the provision was designed among others for the benefit of the execution creditor who is mainly interested in the application of the debtor's property to the payment of his debt, and who had, prior to the enactment of

the provision, no remedy for his injury, except by an action against the sheriff, which might sometimes prove inadequate to indemnify him.

While actions in favor of creditors to set aside fraudulent transfers of the debtor's property, and to remove obstacles in the way of the enforcement of his remedies by execution, have frequently been sustained, it is not believed that in this State, before this statute, creditors had any right of action to recover damages for any interference by third persons with the property which had been seized by the sheriff under process in their favor. This right of action exists, therefore, solely by force of the statute, and must be confined to the cases therein provided for. It is not a general right of action for any and all injuries to such property, but gives the remedy solely for the injury occasioned by a willful withholding and concealment of property from the sheriff. It exists only where the property has been once taken in execution by the sheriff, and would seem to arise solely when he was unable to regain its possession, and dispose of it under the authority conferred by the execution. No right of action is expressly given for an injury to the property while in the possession of the wrong-doer, but the language of the act seems to contemplate only an injury to the rights of the party aggrieved by such an appropriation of the property as deprives him altogether of the benefit thereof. Such an injury cannot be shown until by a return of the process it is demonstrated that the execution remains uncollected, and the property taken from the sheriff cannot be recovered by him and its proceeds applied upon the judgment. Until this time it cannot be said with certainty that the judgment creditor is aggrieved, or, if aggrieved, what is the limit or extent of his grievance.

The act also expressly requires that such concealment and withholding shall be willful on the part of the wrong-doer before he can be subjected to the penalty imposed, thereby precluding the idea that one who dispossesses the sheriff under a claim of right, and detains the property under a belief that he

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has a superior title thereto, can be made liable under this statute.

Not only does the complaint fail to allege that the taking of the property in question by the defendant was willful, but it affirmatively appears by the admission of the plaintiffs' counsel in opening, that the defendant acted under a claim, as a tax collector, and as having acquired a right to the property superior to that of the sheriff, by virtue of a levy under a tax warrant. The fact thus stated seems to show that the taking on the part of the defendant was not willful, within the meaning of this section, or such as subjected him to the penal liability of responding in damages to double the amount of those actually occasioned by his unlawful act.

It also conclusively appears in the case not only from plaintiffs' opening but also from the allegations of the complaint that after the alleged trespass by the defendant, the sheriff regained the possession of the property, and sold and disposed of it under the process held by him.

There is nothing appearing in the case to show that the plaintiffs have not had the benefit of the fair value of the property levied upon.

From the circumstances stated we do not think there is any aspect of the case under which the plaintiffs can recover. The objections stated lie at the foundation of this action, and cannot be obviated on a new trial; and we, therefore, think the judgment should be affirmed.

All concur.

Judgment affirmed.

OLIVER DRAKE SMITH, Respondent, v. MICHAEL I. G. ZALINSKI,
Impleaded, etc., Appellant.

Under the provisions of the Code of Civil Procedure (§ 756 *et seq.*), where, after issue has been joined in an equity action, the plaintiff transfers his interest, the transferee may move to be substituted as plaintiff; and

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where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing supplemental pleadings, or an amendment of the complaint, aside from such substitution the question as to title in the substituted plaintiff is determined by the order, and may not be raised upon the trial; and this, although defendant made default upon the motion.

It seems that upon the hearing of such a motion the applicant must establish his ownership; if it is disputed by defendant, the court may decide it, or if there be doubt, may deny the motion, and order the action to proceed without regard to the transfer. The court may also, in its discretion, order an amendment of the pleadings, or such supplemental pleadings as will present the question on trial.

It seems that if the action be one at law, and defendant contests the change of ownership, and demands that the issue be tried by jury, the court should order such supplemental pleadings.

As to whether, where the court decides the question in favor of substitution, and without permitting allegations to be framed which will let in the new issue at the trial, its order is reviewable here, *quære*.

It seems that the legislature infringes no right of the defendant by not allowing an appeal to this court.

It seems also that such an order of substitution is not final and conclusive; it may be reviewed on appeal to the General Term, the motion may be renewed with the consent of the court, or without that consent, upon a new and different state of facts, or where default was made, the default may be opened.

(Argued December 14, 1883; decided January 29, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made December 30, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 26 Hun, 225.)

This action was brought to foreclose a mortgage executed by defendants Zalinski and wife.

The action was commenced by Gilman, the mortgagee, but after issue joined the court on motion made, on due notice to Zalinski, who alone appeared and answered, and on proof as the order recited that the present plaintiff had become vested "with all the rights and cause of action of the plaintiff herein," granted an order substituting him as plaintiff, and directing the action to proceed in his name. No one appeared for Zalinski on the motion. On the trial, plaintiff

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offered in evidence the bond and mortgage and the order of substitution, and rested. Defendant's counsel moved for a nonsuit on the ground that plaintiff had shown no title or interest in the mortgage, and that the complaint did not allege any interest in him, and so that he had established no right to recover. The motion was denied and defendant duly excepted.

Louis Marshall for appellant. The complaint must show how the right of action arose, and in what capacity the plaintiff sues. (*Scofield v. Whitelegge*, 49 N. Y. 259; *Pattison v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barb. 304; *Vandenburg v. Van Valkenburgh*, 8 id. 257; *Palmer v. Smedley*, 28 id. 466; *People v. Booth*, 32 id. 397; *People v. Ingersoll*, 58 id. 13; *People v. Fields*, id. 507.) The order having been obtained by default does not constitute an adjudication upon the question of title. (*Riggs v. Purcell*, 74 N. Y. 370; *St. John v. Covell*, 10 How. 253; *Emmett v. Bowers*, 23 How. Pr. 300; *St. John v. West*, 4 id. 329; *Arthur v. Griswold*, 60 N. Y. 143; *Dale v. Roosevelt*, 8 Cow. 348; *Forrest v. Forrest*, 6 Duer, 102; *De Graff v. Hovey*, 16 Abb. Pr. 120; *Gleason v. Florida*, 9 Wall. 779; *Clute v. Fitch*, 25 Barb. 428; *People, ex rel. Vogeler, v. Walsh*, 87 N. Y. 481; *Rockwell v. McGovern*, 69 id. 294; *Ely v. Cooke*, 28 id. 374.) There is no allegation that Smith accepted the instrument, or that he assented, in writing, before the recording of the assignment, to accept the trust therein created. This was essential to its validity. (Laws of 1877, chap. 466, § 1; *Pratt v. Stevens*, 26 Hun, 229; *Brennan v. Wilson*, 71 N. Y. 502.) There was no competent evidence of an assignment. (*Belden v. Meeker*, 47 N. Y. 307; *Carroll v. Carroll*, 60 id. 123.)

Charles A. Hawley for respondent. After the transfer of Gilman's interest it was competent for the court to direct the substitution of the present plaintiff. (Code of Civil Procedure, § 756.) The conviction of Gilman and his sentence for five years made it necessary. (2 R. S. 701, § 19.) Substitution should be made on the application of the assignee. (23

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How. 300; 7 Hun, 74.) No amendment of the complaint was either necessary or proper; if it was, it can and should be made now, *nunc pro tunc*. Any mere irregularity is matter for a motion but not a ground of appeal. (*Reeder v. Sayre*, 70 N. Y. 180.) The fact, or the validity of the transfer, or the right of the present plaintiff to be substituted, could have been litigated by the defendant on the hearing of the motion; he was bound to litigate these questions there or not at all, and is bound by the decision there made. (*Allen v. U. I. & E. R. R.*, 15 Hun, 82; *Washoe Tool Co. v. Hibernia Ins. Co.*, 7 id. 74; 66 N. Y. 613; 44 id. 673; 29 Barb. 664; 44 N. Y. 672.) The order may be read in evidence and no other evidence of the present plaintiff's title is necessary. (1 Wait's Pr. 158; *Washoe Tool Co. v. Hibernia Ins. Co.*, 7 Hun, 74; 66 N. Y. 613; *Bond v. Smith*, 4 Hun, 48; *Ford v. David*, 1 Bosw. 569, 571, 583-4, 601; *Underhill v. Cranford*, 29 Barb. 664; *Isham v. Davison*, 3 T. & C. 745; *Moore v. Hamilton*, 44 N. Y. 666, 672-3.)

FINCH, J. The theory on which this case was tried, and the judgment rendered was affirmed by the General Term, is that in case of a transfer of the plaintiff's interest after an action commenced in his name, an order substituting the transferee as plaintiff without directing an amendment of the complaint beyond such substitution, or supplemental pleadings, which order is made on notice to the defendant, is such an adjudication of ownership and title in the substituted plaintiff as excludes that question from the issues to be tried, and leaves only to be examined those originally framed, and which the unchanged pleadings present. It is not to be doubted that in every such case the defendant is entitled at some time and in some way to contest, if he shall please, the title of the transferee, but if he is granted that opportunity once, he has no right to complain if he is refused it a second time. Such a transfer of interest is usually a formal matter in which the defendant has no concern except to be protected from a double claim. In all other respects the vital issues of the litigation remain un-

changed, and they only are to be tried. The power of the legislature to thus regulate the practice is not denied, and the sole question is whether it has so done. The Code provides (§ 756), that "in case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party; unless the court directs the person to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires." Then follows a section providing that in case of the death of a sole plaintiff or sole defendant, if the cause of action survive, "the court must, upon a motion, allow or compel the action to be continued by or against his representative, or successor in interest." Other succeeding sections (§§ 758, 759) reach the case of the death of one of two or more plaintiffs or one of two or more defendants; and then follows a general provision applicable to all the cases which precede it. (§ 760.) That directs that where the person applying does so in his own behalf, "the court may direct that he be made a party, by amendment of the pleadings, or otherwise, as the case requires." The section contains still other provisions guarding the rights of parties, but not necessary here to be repeated. And thus, pending an action, with its issues already raised and fixed by the pleadings, a transferee of the plaintiff's interest may move to be substituted in his place. Notice of the motion must be given to the defendant. On the hearing the applicant must establish his ownership and the defendant may deny it. If there be doubt about it the court may deny the motion and order the action to proceed irrespective of any such transfer. If there be no doubt about it, or the defendant by default or silence admits it, the court may order the substitution; and even then, if justice or safety requires, it may order an amendment of the pleadings, "or otherwise." By this process the defendant has ample chance to understand and contest the new ownership. If on the motion he raises the issue the court may decide it, or order such supplemental pleadings beyond the mere substitution as to carry the contested issue over to the trial. If the court decides it, and orders sub-

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stitution without changing the pleadings, it cannot be raised again upon the hearing. In an equity case, such as this, the issue on the motion is decided, if it be decided, by the sort of tribunal to which alone the defendant is entitled. In an action at law, where the defendant stands contesting the ownership and demanding that the issue, like the old ones, be tried by the jury to which he is entitled, it may be that the court should order such supplemental pleadings as would introduce the new issue into the trial. Thus all the rights of the defendant in every case are fully protected. Only one suggestion is made to the contrary. On the motion, where the court decides the question in favor of substitution and without permitting allegations to be framed which will let in the new issue at the trial, the dissatisfied defendant has only the further remedy of an appeal from the order, but it is said, on that appeal, he can go no further than the General Term and cannot review the order in this court. That may be, though we do not so decide, but the legislature infringes no right of the defendant by not allowing an appeal to this court. This, therefore, seems to follow inevitably. Where the court grants the order, and directs no amendment of the pleadings beyond the substitution of the transferee as plaintiff, the ownership of the transferee stands settled for all the purposes of the action, and must so stand upon the production of the order. In the pleadings there is no assertion of the new plaintiff's title on the one hand, nor denial of it on the other. No such issue is presented because the court did not permit it to be presented, and necessarily the order of substitution becomes final upon the question of the transferee's ownership. Otherwise we should have the novel practice of a material issue litigated wholly outside of the pleadings, and originated after issue joined. But the learned counsel for the appellant, citing *Riggs v. Pursell* (74 N. Y. 370) insists that such an order is not final and conclusive in an after controversy. That is true in the sense explained by that decision. That the motion may be renewed with the consent of the court, and even without that consent upon a new and different state of facts; that where the motion was litigated a matter not

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necessarily involved in it, and not in fact litigated, is not concluded by the order, this court certainly held. But here the order of substitution was neither appealed from, nor a motion made to open a default, nor a new motion sought to be made, nor indeed can it be said that the ownership of the transferee was not necessarily involved. On the contrary that ownership was the one vital question involved in the motion and its decision. The order declares "it appearing that the said petitioner has become vested with all the rights and cause of action of the plaintiff herein," and then directs the substitution. It is not weakened by the fact that the defendant made default. The court had a right to assume that the alleged ownership was conceded and that no issue was raised over it. The adjudicated cases confirm this view of the practice. *Isham v. Davison* (3 T. & C. 745) was the case of an order made upon the death *pendente lite* of the plaintiff, substituting his executor. Upon the trial it was objected to the title of the executor that there was no proof of the death of the testator. The General Term held that no proof on the subject was needed, and the title of the new plaintiff was established by the order. *Moore v. Hamilton* (44 N. Y. 673) indicates the opinion of this court as to the effect of such an order. In that case when the substitution was made the action was partly tried before a referee appointed by consent. This court held that the reference remained unaffected, that the pleadings continued the same, and all the prior proceedings were valid and operative. In *Ford v. David* (1 Bosw. 569) the motion to substitute the transferees had been denied. Upon the trial the defendants asked that the complaint be dismissed upon the ground that it appeared that the plaintiff had no interest in the action. The General Term held that the order denying the motion for substitution precluded the defendant from raising the question. That is, for the purposes of the trial and under the order, Ford was to be deemed the party in interest notwithstanding his transfer. In *Underhill v. Crawford* (29 Barb. 664) it was held that the order of revivor was at the trial conclusive upon the point whether the action had been properly revived in the name of the executor,

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and whether a recovery could be had in his name. And the court added that "if the executor had sold and transferred the notes before the order of revivor so that at the time the order was made neither he as executor nor the estate of Peter Underhill had any interest in the continuance of the action, then the defendants should have opposed the making of the order; or should have moved to vacate it on that ground; but the order standing in full force was conclusive upon the judge at the trial that the action was properly revived and continued in the name of the executor." These cases sustain the view we have taken of the effect of an order of substitution under the Code, and show that no error was committed by the ruling in the present case.

The judgment should be affirmed, with costs.

All concur, except RUGER, Ch. J., not sitting, and RAPALLO and EARL, JJ., not voting.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
EDWARD KELLY, Appellant.

A motion for arrest of judgment in a criminal action could not, before the adoption of the Code of Criminal Procedure, and cannot now, be made, save for some defect that appears upon the record; it may not be based upon proof by affidavit of facts outside, and constituting no part of the record. (Code of Criminal Procedure, § 467.)

Proof by affidavit that the jury on trial of such an action, after retiring to their room, sent a written communication to the presiding judge, and that he answered the same in writing, in the absence of proof as to the nature of the communication, is not sufficient to sustain a motion for a new trial.

It seems, that for the purpose of presenting the question the true practice in such case is to make a statement of the facts presented by the affidavit, as part of a proposed case and exceptions, thus giving to the court an opportunity of making and incorporating in the record an explanation disclosing the character of the communications.

Upon the trial of an indictment for an assault with a deadly weapon with intent to kill, it appeared that, at the time of the occurrence, defendant

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was in pursuit of S., with whom he had had a difficulty. S. was called as a witness for the prosecution, and on cross-examination, testified that he had collected money for and given it to the complainant. He was then asked "When did you hand it to him?" This was objected to, and excluded. *Held* no error.

Evidence on the part of defendant was offered and rejected as to violent acts on the part of S. at other times. *Held* no error.

It seems, that, if it had appeared that the assault was committed in self-defense, proof as to the character of the complainant would have been competent, but as it appeared that it was not so committed, even such evidence would have been incompetent.

It is within the discretion of the court on a criminal trial to fix a limit upon the time to be used by counsel in summing up the case to the jury, and unless it appears that the discretion has been abused, it is not a subject for review on appeal.

Where the time allotted to the defendant's counsel was thirty minutes, and to the district attorney twenty-five, and it appeared that the former was stopped by the court at the expiration of his time, but that the latter continued his address for five minutes more than his allotted time, when he was stopped, *held*, that this did not tend to establish an abuse of discretion; that the defendant's counsel had the right to ask the court to stop the district attorney at the expiration of his time, and not having done so, there was no ground for complaint.

(Argued January 14, 1884; decided January 29, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made December 26, 1883, which affirmed a judgment of the Court of General Sessions in and for the city and county of New York, entered upon a verdict convicting defendant of the crime of assault with a deadly weapon, with intent to kill.

The material facts are stated in the opinion.

John H. McKinley for appellant. The court erred in asking questions of the defendant, the answers to which might tend to criminate him without first informing him of his privilege to answer or not. (Code of Crim. Proc., § 196.) Defendant's intent was a lawful one; he was not in the prosecution of a felony, but in the protection of his right to defend his life, and he had the right to exercise his judgment as to the extent of his jeopardy. (*Pontius v. People*, 82 N. Y. 339.) An

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injury inflicted accidentally or without primary intent to injure, upon a third party, during an altercation between several parties, has the same effect in its legal consequences as if the accused had directly inflicted the injury upon the party he intended to injure, and a prosecution against a defendant for an offense thus committed against an innocent third party is subject to all the rules of law and evidence as if the said third party was not in the contest at all. (*Res v. Jurvis*, 2 M. & R. 40; *Regina v. Smith*, 33 Eng. Law. & Eq. 567.) The court erred in refusing to the defendant the privilege of showing the character, generally and specifically, of the party he, the defendant, was pursuing. (*Wright v. State*, 9 Yerg. 342; *State v. Tackett*, 1 Hawks, 210; *Pritchell v. State*, 22 Ala. 39; *Harmon v. State*, 3 Head, 243; *State v. Patterson*, 45 Vt. 314.) Self-defense is a primary law of nature, and a man is justified in defending himself even to the taking of life. (*Scribner v. Beach*, 4 Denio, 448.) In every case where an assault independent of battery is made, a man is instantly justified in repelling it, without waiting until he has received a corporeal injury. (Bull. N. P. 18; 2 Rolle's Abr. 547; E. 37; *Dale v. Wood*, 7 Moore, 33; *State v. Davis*, 1 Wend. 125; *State v. Patterson*, 45 Vt. 323.) The nature of the wound tends to show the intent. (*Res v. Akenhead*, 1 Holt's N. P. R. 469; Stark. Ev. 691.) A defendant may testify as to his intent. (*Kerrains v. People*, 60 N. Y. 221.) The guilt or innocence of defendant would hinge upon the question as whether at the time of the injury he was engaged in a felony, or was acting in his own defense. (*Lenahan v. People*, 5 T. & C. 265; 3 Hun, 164, 716; *Evers v. People*, 6 T. & C. 156.) The burden of proof is on the prosecution; they must show conclusively the intent to kill. It is the intention to take life that constitutes the offense of murder in the second degree. (*People v. Austin*, 1 Park. Cr. 154; *People v. Johnson*, id. 291, 659; *People v. Allen*, 4 id. 619.) The court erred in permitting a view of complainant's wounds, or in permitting the complainant to exhibit his hand to the jury. (Code of Crim. Pro., § 411.) The jury may take with them any notes of the evidence taken

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by themselves and by no other person. (Code of Crim. Pro. § 426.) After the jury retire, if they want any information of a point of law arising in the cause, they must require the officer to conduct them into the court, after notice to the district attorney and defendant's counsel, and in cases of felony in the presence of the prisoner. (Code of Crim. Pro., § 427.) The court erred in not permitting defendant to show that he was in fear of his life, from his knowledge of the desperate character of the witness Strack, from his own knowledge that Strack was a man far more dangerous to fly from than to meet in open conflict. (*Harmon v. State*, 3 Head, 243.) The judgment should be set aside because, contrary to law, the jury held written communication with the presiding judge, pending their deliberation, the defendant not being present. (*Maurer v. People*, 43 N. Y. 1; *People v. Perkins*, 1 Wend. 91; 2 R. S. 759; *State v. Patterson*, 45 Vt. 308; *Taylor v. Betsford*, 13 Johns. 487; *Hoberg v. State of Minn.*, 3 Minn. 262; *Plunkett v. Appleton*, 51 How. 469; *Watertown B'k and L. Co. v. Mix*, 51 N. Y. 558; 2 R. S. 760, § 21; *Crabtree v. Hogenburgh*, 23 Ill. 349; *Fisk v. Smith*, 12 id. 563.) Defendant was not bound to show affirmatively that the communication was in relation to the case. (*Watertown B'k and L. Co. v. Mix*, 51 N. Y. 558; *Sargent v. Roberts*, 1 Pick. 337; *State v. Frisby*, 19 La. Ann. 143; *Taylor v. Betsford*, 13 Johns. 487; *Benson, ex rel. v. Clark*, 1 Cow. 258; *Moody v. Pomeroy*, 4 Den. 115.) Defendant is not confined in his motion in arrest of judgment to the indictment only, but may include the whole record. (*People v. Bruno*, 9 Park. 657.) If a jury take out evidence read upon the trial, and also something not read, it is ground for a new trial. (*Mitchel's Case*, 1 C. H., § 147; Code of Crim. Pro., § 465.)

John Vincent for respondent. A motion in arrest of judgment, made after verdict, based upon affidavits, had no foundation, and such an application is irregular and the action of the court thereon at trial term cannot be reviewed. (Code of Crim.

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Pro., §§ 231, 467.) On a motion in arrest of judgment the defendant can only avail himself of the defects appearing on the record, and the affidavits offered are no part of the record. (*People v. Gaffney*, 50 N. Y. 424; *People v. Thompson*, 41 id. 1; *People v. Allen*, 43 id. 28; *Jacobowsky v. People*, 6 Hun, 524; 64 N. Y. 659.) The limit of time in which counsel are to sum up rests in the sound discretion of the court; it is not an absolute right to the counsel to prolong his speech to the detriment of the other business of the court. (*People v. Cook*, 8 N. Y. 67.) The message from the jury-room to the court, and one in reply from the court to the jury-room, does not furnish ground for an exception. (*Mandeville v. Reynolds*, 68 N. Y. 528; Code of Civil Procedure, §§ 465, 542.)

MILLER, J. The defendant was tried at the Court of General Sessions in the city of New York, upon an indictment containing two counts, one charging an assault with a deadly weapon with intent to kill, and the other an assault with a dangerous weapon, with intent to do bodily harm, and was convicted on the first count. After conviction the defendant moved for a new trial, which motion was denied, and a motion was then made for an arrest of judgment upon the same grounds as the motion for a new trial, and also upon an affidavit setting forth that the court had communicated with the jury in the absence of the defendant and his counsel, which motion was also denied, and an exception taken. A motion in arrest of judgment must be made for some defect which appears on the face of the record, and cannot be based upon a mere affidavit showing the existence of facts outside of the record, and which do not constitute a part of the same. This was the rule which prevailed before the enactment of the Code of Criminal Procedure. Under that Code provision is made for motions of this kind. Under section 467 such a motion may be founded upon any defects in the indictment which are mentioned in section 331. That section declares that an objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at

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the trial under the plea of not guilty, and in arrest of judgment. The motion here was not made upon the ground of any defect appearing in the indictment, or in the record of the proceedings upon the trial, and it cannot, therefore, be considered as a motion in arrest of judgment in accordance with the provisions of the Code already cited. The motion can only be considered as an application for a new trial made upon affidavits, and it cannot be entertained as a motion of that kind, under the Code, for it is not brought within the provisions of either of the subdivisions of section 465, which regulate motions of that character. The ground upon which the motion in arrest of judgment in this case was made, as shown by the affidavit, was that a written communication was received from the jury, after retiring to their room, by the recorder, and that such communication was answered by him in writing. The nature of the communication between the jury and the court is not disclosed, and it nowhere appears, by the record in this case, that any thing transpired, by reason of such communication, which affected the rights of the defendant, or that he was in any way injured thereby. There is no affirmative proof whatever to the effect that the correspondence had any relation to the defendant's case. As the matter stood it is a fair assumption that, there being no improper act done within the knowledge of the court, the recorder was entirely justified in refusing to grant the motion made upon any such ground, even if there was authority for such an act in the case presented. The true practice, it seems to us, would have been to have made a statement of the facts presented by the affidavit as a part of the case and exceptions proposed, and thus furnish an opportunity to the court to make an explanation disclosing the character of the communication. This was the regular course to pursue, and in this manner all the facts relating to the alleged correspondence would have been developed and the record would have shown what actually did take place. What did take place, if it had any relation to the trial of the defendant, constituted a part and portion of the same and should have been incorporated in the record if it affected in any way the

rights of the defendant. This course would have been the proper one in accordance with the decision of this court in *Maurer v. The People* (43 N. Y. 1), and in this manner all the facts would have been presented, and the defendant would have received the benefit if any error had been committed by the court or any wrong done to him. It may be remarked that, even if, upon the motion, the question was presented, it is by no means clear that the note or communication sent to the jury had any relation whatever to the case upon trial. The presumption is that there was no violation of duty on the part of the court. Without, however, deciding the question whether sufficient was shown, by the affidavit, to authorize the court to grant the motion in arrest of judgment, it is enough to say that that point, as the case stands, is not now presented for review. It appeared on the trial that the difficulty which resulted in the alleged assault occurred in the saloon of one Maurice Strack, that defendant was put out of the saloon by Strack, but returned with a butcher's cleaver and made the assault. Upon the cross-examination of Strack, who was examined as a witness for the prosecution, it was proved that he had collected money for and given the same to the complainant. The question was then put, "when did you hand it to him?" This was objected to and excluded and an exception taken. We think that this evidence was not material and that there was no error committed by the court in excluding the same. The defendant had proved all that was essential to establish the relation which existed between this witness and the complainant, and the evidence which was intended to be introduced by the question put, could not in any way affect the matter, and did not bear such a relation to the same as to render it admissible. We think there was no error committed in rejecting the testimony offered for the purpose of showing the character of the witness Strack, so far as it established violent acts on his part at other and different times. The evidence does not show that the assault was committed in self-defense; the proof is that the defendant was pursuing Strack at the time the deed was done. If the assault had been committed in self-defense, it would have been com-

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petent to show the character of the complainant in justification of the assault made, but evidence as to the character of the witness Strack could have no bearing whatever on the case and was properly excluded. The claim of the defendant's counsel that the defendant was in pursuit of Strack and not the complainant, and that he accidentally assaulted the complainant, would not, under the circumstances presented, justify the admission of the evidence offered, or relieve the defendant from liability for the offense committed. There is, we think, no ground for the claim of the defendant that he would have been justified in taking complainant's life as a matter of self-defense, as he was not assailed at the time or driven to the wall, so as to render such an act a matter of necessity. The question of intent was one of fact for the consideration of the jury. We can discover no error in the charge made or in the refusals to charge as requested.

It was insisted upon the argument, but not claimed in the printed points, that the court erred in limiting the defendant's counsel to thirty minutes in his address to the jury. It appears that when the counsel for the defendant proceeded to sum up, the court decided to limit him to half an hour, and the prosecution to twenty-five minutes. This was objected to, and the counsel began his address to the jury, and at the end of thirty minutes he was called upon to stop by the court. He stated he was not through. The court refused to permit him to proceed, and the counsel excepted to the ruling. The counsel for the people then proceeded to address the jury and continued until five minutes more than his allotted time had expired, when he was called upon to stop. The time which counsel are to occupy in presenting a case to the consideration of a jury necessarily must be, to a great extent, a matter in the discretion of the court. Were it otherwise an unlimited period might be taken without any advantage to the client and causing great delay in the proceedings of the court and an injury to the administration of justice. The time to be used for such a purpose must, therefore, be a matter to be regulated by the presiding judge upon the trial, the same as any other proceeding during the progress of the case. It is to be presumed that

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the court will properly guard and protect the rights of parties so that justice can be administered to all, and the judge is certainly a competent and the proper person to determine as to the time which would be required for a proper discussion and presentation of the case upon trial. Hence it follows that the court has a right to exercise a discretion in this respect, and unless such discretion is abused it is not the subject of review in a higher tribunal. In the case at bar the testimony lies within a narrow compass; not many witnesses were sworn, and the questions of fact presented were not numerous. The trial was commenced and the evidence on both sides submitted the same day. The principal defense interposed by the defendant was self-defense, and some evidence was introduced tending to show that the defendant, at times, had been affected in his mind so as to render him irresponsible for the act done. There was, however, no direct proof that such was the case at the time of the assault for which he was tried. Upon the whole case the testimony was not very complicated, and although a difference of opinion might exist among counsel and judges as to the period of time which would be required for the proper presentation of the case for the defendant, yet we think it cannot be said that the judge, upon the trial of this case, in the exercise of his functions, and having in view the gravity of the charge and the rights of the defendant, exceeded his powers or abused the discretion with which he was invested. There is no ground for claiming that justice was not impartially administered or that the time allowed was not entirely sufficient to cover the case under the facts developed. The fact that the district attorney exceeded the time allowed him may have arisen from inadvertence and does not tend in any way to establish that the discretion of the judge was improperly exercised. The counsel for the defendant had the right to ask the judge to stop him when his time had expired, and, not having made that objection, he has no real ground of complaint.

As no ground of error is manifest, the judgment should be affirmed.

All concur, except DANFORTH, J.. not voting.

Judgment affirmed.

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MARIA DE LA SALUD OVIEDO YOUNGER, Respondent, v. MARY ANN PELTON DUFFIE, Impleaded, etc., Appellant.

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A subscription to a will by the testator after the attestation clause meets the requirement of the statute (2 R. S. 63, § 40), requiring the subscription to be "at the end of the will." The testator by so signing makes the attestation clause a part of the will; and so, as nothing intervenes, the subscription is at the end of the will.

The complaint, in an action under the Code of Civil Procedure (§ 1861) to establish a will, alleged in substance, that the testator, an inhabitant of, and domiciled in the county of R., in this State, and possessed of personal property therein, but temporarily residing in Spain, duly signed, published, declared and executed the instrument in question before a notary, that it remains on file in the office of the notary, from which, by reason of the laws of Spain, it cannot be taken, and that plaintiff is a legatee under the will. *Held*, that a case was made out authorizing the action.

(Argued January 14, 1884; decided January 29, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made November 24, 1882, which affirmed an interlocutory judgment entered upon an order overruling a demurrer to plaintiff's complaint. (Reported below, 28 Hun, 242.)

The nature of the action and the substance of the complaint are stated in the opinion.

John N. Lewis for appellant. A paper purporting to be a will, executed in conformity with the laws of another country by a person "temporarily residing" in that country at the time of his death, but being "an inhabitant of and domiciled in this State," cannot be admitted to probate, or proved or established as such in this State, unless executed in the manner prescribed by our statute. (2 R. S. 63, § 40; Code of Civil Pro., §§ 1861, 2611; *Isham v. Gibbons*, 1 Bradf. 69-81, 84; *De Meli v. De Meli*, 90 N. Y. 654; 15 Weekly Dig. 398; *Cadwalader v. Howell*, 3 Harr. [N. J.] 144; Redf. Law and Pr., Surr. Courts [2d ed.], 132.) In construing a statute, the courts should not assume that any innovation upon the common law was intended

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to be made further than the case absolutely required. (*White v. Wager*, 32 Barb. 250; 25 N. Y. 328; 1 Kent's Com. 464; Smith on Statutes, §§ 701, 703; *Howe v. Peckham*, 6 How. Pr. 229-232; *Hart v. Cleis*, 8 Johns. 44; *Dominick v. Michael*, 4 Sandf. 374; Potter's Dwarries on Statutes, 185.) The paper sought to be established as the will of General Duffie was not executed in conformity with the requirements of our statute in this, it is not "subscribed by the testator at the end of the will." (*In re Oneill*, 91 N. Y. 516, 520; *Tonnele v. Hall*, 4 id. 140, 146; *McGuire v. Kerr*, 2 Bradf. 244, 257; *In re Gilman*, 38 Barb. 364, 368; 2 Blackstone's Com. 499; 4 Kent's Com. 501; *Langdon v. Astor's Exr's*, 16 N. Y. 9, 49; 1 Williams on Executors, 6; 1 Jarman on Wills, 16; O'Hara on Construction of Wills, 4.) The attestation clause is no part of the will, and is not required as a part of its due execution by any law. (*Jackson v. Jackson*, 39 N. Y. 153, 159; *In re Cohen*, 1 Tucker, 286, 288; *Sisters of Charity v. Kelley*, 67 N. Y. 409, 415.)

Emmet R. Olcott for respondent. The will and codicil are executed with the formalities prescribed by the laws of this State. (2 R. S. 63, § 40.) The request to the witnesses to sign may be taken as presumed and implied. (*Butler v. Benson*, 1 Barb. 352; *Doe v. Roe*, 2 id. 200; *Brown v. De Selding*, 4 Sandf. 10; *Hutchings v. Cochrane*, 2 Barb. 295.) The allegations of the supplemental complaint and the will and codicil themselves show a sufficient compliance with the statute. (*Brown v. De Selding*, 2 Sandf. 10; *Coffin v. Coffin*, 23 N. Y. 16; *Gilbert v. Knox*, 52 id. 125.) A surrogate has jurisdiction to take proof of a will disposing of real and personal estate, situate both in his county and in a foreign country, made by a citizen of the State and a former resident of such county, but a resident of such foreign country at the time of his death, though the will has been admitted to probate in such foreign country, and is in possession and custody of a foreign court, whence it cannot, according to the laws of that country, be obtained. (*Russell v. Hart*, 87

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N. Y. 19; *Caulfield v. Sullivan*, 85 id. 153.) *Prima facie*, the word "residence" is not synonymous with "domicile." (*Roosevelt v. Kellogg*, 20 Johns. 208; *In re Thompson*, 1 Wend. 45; *Frost v. Brishin*, 19 id. 14; *Haggart v. Morgan*, 5 N. Y. 422, 428; 13 Maas. 501; 5 Pick. 370; 1 Metc. 251; 2 Gray, 490; 11 La. 175; 5 Me. 143; 17 Pick. 231; 15 Mo. 58.) "Residence" and "habitation" are usually synonymous. (2 Gray, 490; 2 Kent's Com. 430, 431 note.) Inhabitation and residence do not mean precisely the same thing as domicile, when the latter is applied to successions to personal estates, but they mean a fixed and permanent abode, a dwelling-house for the time being, as contradistinguished from a mere temporary locality of existence. (*In re Wregley*, 8 Wend. 134, 140; 4 id. 602.) Residence and domicile are not synonymous. (*Bartlett v. Mayor, etc., of N. Y.*, 5 Sandf. 44.) Fixity and permanence of abode are more strongly imported by the term "inhabitation" than by that of "residence." (*Matter of Hughes*, 1 Tuck. 38.) A will of personal property, valid as to the formalities of its execution by the *lex loci actus*, is valid everywhere. (Rodenburg, 11, chap. 3, § 1; Bartolus in L. i. C. de S. Trin., No. 36; P. Voet, 9, c. 2, No. 1; Vattel L., 2, chap. 8, § 3; Hert, 4, §§ 23, 25; Foelix, 107 foll. [ed. Demangeat, 1163]; Boullenois, 422; Bauhier, chap. 25, No. 61; Mittermaier, § 32, p. 121; Wachter, 2, p. 191, pp. 368-380; Gand, No. 579; Savigny, 355; Bar, § 109; Serey, 321, p. 51; Striethorst, 23, p. 253; French Code Civ., art. 999, 1317; Fiore, §§ 404-6; Italian Code, preface, art. 9; French Civil Code, § 999; Prussian Code, § 114; Phillimore, 864; Savigny, 8, § 381 in fine; *Onslow v. Cannon*, 2 Sw. & Tr. 136; *Purvis' Trustees v. Purvis' Executors*, id. and 23 D. 812.)

EARL, J. This action was brought under section 1861 of the Code of Civil Procedure to procure a judgment establishing an instrument as the last will and testament of Alfred N. Duffie. The complaint, among other things, alleges that Duffie, late United States consul at Andalusia, in the kingdom of Spain, temporarily residing at Cadiz in that kingdom, but an

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inhabitant of and domiciled in the county of Richmond and State of New York, died on the 8th day of November, 1880, at the city of Cadiz, and that he was at the time of his death possessed of personal property within the State of New York; that the plaintiff is a legatee under his will; that prior to his death, and on or about the 28th day of January, 1880, Duffie, at the city of Cadiz, duly signed, published, declared and executed before a notary, and in the presence of, and with three witnesses, his last will and testament; and that, on the 1st day of May, 1881, before the same notary and the same three witnesses, he also signed, published, declared and executed a codicil thereto, a copy of which will, together with the codicil, is annexed to the complaint and made a part thereof, the original will and codicil being in the Spanish language and in the kingdom of Spain; that they were duly executed in conformity with the laws of Spain, and remain on file among the archives of the notary's office at the city of Cadiz, from which the same cannot, by reason of the laws of Spain, be taken for the purpose of being admitted to probate under the laws of the State of New York, or for any other purpose whatsoever. The disposing part of the will is divided into seven paragraphs, and between the end of the last paragraph and the signature of the testator is the following language: "In testimony whereof I do execute the same at the city of Cadiz, on the 28th day of January, 1880. And the testator whom I, Ricardo de Pro y Fajardo, a notary of this district, and of the illustrious College of Seville, do certify that I know, thus said executed and signed, with the witnesses present, who were Salvador de Aspres, Salvador Ramirez and Manuel Ceneles, all of this vicinity, I having read to all of them this will, after first notifying them of the right which they have by law to verify the same themselves, which right they renounced, he not exhibiting his personal certificate by reason of the office held by him, all of which I certify." Then follows the signature of the testator, the three subscribing witnesses and the notary. The codicil was executed in substantially the same way. The defendant, Mary Ann Pelton Duffie, the appellant, demurred

to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled at Special Term, and the judgment of the Special Term was affirmed at the General Term, and then she appealed to this court.

Section 1861 of the Code provides as follows: "An action to procure a judgment establishing a will may be maintained by any person interested in the establishment thereof, in either of the following cases." The first case is as follows: "Where a will of real or personal property, or both, has been executed in such a manner, and under such circumstances, that it might, under the laws of the State, be admitted to probate in a surrogate's court, but the original will is in another State or country, under such circumstances that it cannot be obtained for that purpose, or has been lost or destroyed by accident or design before it was duly proved and recorded within the State." It is conceded that this case comes within this provision, provided this will was executed according to the formalities prescribed by the laws of this State. But the objection is made that the will was not "subscribed by the testator at the end thereof."

The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose. What shall form part of the instrument which the testator intends as his will must be determined by him. It is true, as claimed by the learned counsel for the respondent, that a proper definition of a will is an instrument by which a person makes a disposition of his property to take effect after his decease. But every word contained in the instrument may not relate to or bear upon the disposition of property. It is not uncommon for the testator to recite in the will his religious faith and hopes and the moral or prudential maxims which have guided his life, and to give directions concerning his body, and to make many declarations which have no bearing whatever upon the disposition of his property; and yet they are all part of the instrument which he

intends as his will. Such matters and declarations are usually inserted at the commencement of the will, but they may as well be placed after the disposing parts of the will; and yet if the signature in such case is placed below them, it is at the end of the will, within the meaning of the statute. So too ordinarily what is called the attestation clause, when it follows the signature, is no part of the will. (*Jackson v. Jackson*, 39 N. Y. 153.) It is not essential to the validity of a will, and as it follows the signature, it cannot be taken as a part thereof. But if the testator chooses to insert the attestation clause before his signature, thus making it a part of the instrument, then like any other matter contained in the will which does not relate to the disposition of property, it becomes a part of the instrument called a will. If the testator, beneath the disposing part of the will, and before his signature, should insert the Apostles' creed, or the Lord's prayer, it would be part of the instrument called a will, and although it would intervene between the signature and the disposing part of the will, it could not be contended that the will was not subscribed at its end. So it is common in the execution of wills to insert just before the signature, a testimonium clause as here "in testimony whereof I so execute the same, at the city of Cadiz, on the 28th day of January, 1880." That is strictly no part of the will; it is not essential to its validity, the date being of no importance, and yet it never has been doubted that the signature beneath such a clause would be at the end of the will; and so it would be if the recital were much longer and fuller. Here the testator chose to have inserted before his signature the language of the notary, reciting the mode of execution, and the names of the witnesses, and the fact that the will was read to all of them. He thus chose to make that a part of the instrument, and his subscription beneath it was a subscription at the end of the will.

The case is not within the mischief intended to be guarded against by the statute. There is certainly no authority in this State holding that such a subscription is not at the end of the will. In *McGuire v. Kerr* (2 Bradf. 244), and in *In re Will of O'Neil* (91 N. Y. 516) portions of the will succeeded the sig-

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nature of the testator, and hence in each of those cases it was held that the will was not subscribed at the end thereof. In *The Matter of Gilman* (38 Barb. 364), it was held that an instrument was signed at the end thereof, "where nothing intervenes between the instrument and the subscription." Here nothing intervenes between the instrument and the name of the testator.

We must, therefore, hold that this will was subscribed at the end thereof, and that it was provable in the Surrogate's Court of Richmond county, but for the fact that it could not be procured for that purpose, and hence this is a case within section 1861, wherein an action to establish the will is authorized.

It is not important to determine, and we do not determine whether or not this action could be maintained under the second subdivision of section 1861; and the conclusion we have reached also renders it unimportant to determine the question raised by the motion to dismiss the appeal.

The judgment should be affirmed, with costs, but with leave to the defendant, Mrs. Duffie, upon payment of costs, to answer the complaint within twenty days.

All concur.

Judgment accordingly.

WILLIAM P. CLYDE, et al., Respondents, v. AMOS ROGERS,
Appellant.

After the granting of a General Term order herein, which in effect gave the defendant liberty to inspect plaintiffs' books and papers, plaintiffs moved, at a Special Term, on additional facts, for an order vacating or limiting the General Term order; the motion was denied on the ground that plaintiffs' remedy was by application to the General Term, but a stay of proceedings was granted for the purposes of such an application, unless defendant would stipulate to take an inspection under the supervision of a referee. Defendant refused to stipulate, and appealed. The General Term affirmed the order, and, upon the new facts presented, vacated its former order, and prohibited the making of a new order for an inspection. *Held*, that an inspection having been granted upon terms

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which the Special Term could lawfully impose, upon defendant's refusal to accept those terms it was in the discretion of the General Term to deny the inspection entirely, and the exercise of this discretion was not reviewable here.

(Argued January 15, 1884; decided January 29, 1884.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made May 14, 1883, the substance of which, as well as the material facts, are stated in the opinion.

Asa Bird Gardner for appellant. The order of the Special Term setting aside the subpoena *duces tecum*, and relieving the plaintiffs from the obligation thereof, was properly reversed, and should not have been vacated. (Code of Civ. Pro., §§ 867, 803-809; 2 Wait's Pr. 551; *Amey v. Long*, 9 East, 436; *In re Stokes*, 23 Hun, 566; 2 Wait's Pr. 533; *Law v. Graydon*, 14 Abb. 443; *Lefferts v. Brampton*, 24 How. 257; *Holtz v. Schmidt*, 2 J. & S. 30, 34; 1 Phillips' Ev. 3; *Bull v. Loreland*, 10 Pick. 9, 14; *Bonesteel v. Lynde*, 8 How. Pr. 226; id. 352; *People v. Dyckman*, 24 id. 222; *Morrison v. Sturgis*, 28 id. 174, 179; *Lane v. Cole*, 12 Barb. 680; *Brett v. Buckman*, 32 id. 655; *Garighe v. Losche*, 6 Abb. 284; *Jarvis v. Clerk*, 12 N. Y. Leg. Obs. 129; *Mitchell's Case*, 12 Abb. 249, 262; *Cent. Nat. B'k v. Arthur*, 2 Sweeney, 200; *Met. Nat. B'k v. Hale*, 23 Hun, 341; *Harrison v. Van Volkenburgh*, 5 id. 454; *March v. Davison*, 9 Paige, 580; *Vance v. Andrews*, 2 Barb. Ch. 370; *Livingston v. Curtis*, 54 How. Pr. 374.) The subsequent petition of the defendant to the Special Term for an inspection under § 805 of the Code, of the documents mentioned in the subpoena *duces tecum*, after said subpoena had been set aside, was regular and contained all necessary averments, and should have been granted as a statutory right. (*Hunt v. Hewitt*, 7 Exch. 236; *Jackling v. Edmonds*, 3 E. D. Smith, 539; *People v. Rector of Trinity Church*, 6 Abb. 177; *Cassard v. Hinman*, 6 Duer, 695; *Hoyt v. Am. Ex. B'k*, 1 id. 652; *Thompson v. Erie R'y*, 9 Abb. [N. S.] 212; *Pegram v. Curson*, 10 Abb. 340; *Gelston v. Marshall*,

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6 How. 398; *Stanton v. D. Mut. Ins. Co.*, 2 Sandf. 662; *Tyler v. Drayton*, 2 S. & S. 309; *Llewellyn v. Badely*, 1 Hare, 527; *Hughes v. Biddulph*, 4 Russ. 190.)

E. C. Boardman for respondents. The granting or withholding of the order by the General Term rested wholly in its discretion, and the exercise of such discretion is not reviewable here. (*Clyde v. Rogers*, 87 N. Y. 625.)

Per Curiam. The order appealed from was discretionary, and did not invade any absolute right of the defendant. The plaintiffs had obtained two orders, one setting aside a subpoena *duces tecum*, the other denying an application of defendant for an inspection and permission to take copies of certain of plaintiffs' books and papers; these orders had been reversed by the General Term, and the defendant left at perfect liberty to have an inspection of the plaintiffs' books; dissatisfied with that result, the plaintiff moved upon new and additional facts for an order vacating or limiting the General Term order of reversal, but made his application before Judge PRATT at Special Term. The motion was denied upon the ground that the order of the General Term could not be thus vacated or modified by the Special Term, and that the sole remedy was an application to the General Term itself. Thereupon, to enable such application to be made, Judge PRATT granted to the plaintiffs a stay of proceedings unless the defendant should stipulate to take an inspection of the books under the supervision of a referee, in which case a referee should be appointed, and plaintiffs' motion be denied absolutely. The defendant refused to stipulate, and appealed. Of course his only grievance was the stay; and whether it should or should not have been granted was the sole question which he could raise on his appeal, and involved merely the discretion of the courts below. But the General Term, with all the facts before it, brought there by the appeal, did three things. It affirmed Judge PRATT's order. Under that order defendant could have had an inspection of the books, provided only that he consented to the supervision of a referee. He lost

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that right by his voluntary act of refusal. The General Term then, treating the whole case upon the newly stated facts as before the court, vacated its own order granting an inspection, and prohibited the making of any new order for such inspection, and it is from such order that the appeal here pending is taken. It thus becomes apparent that the defendant has been refused no absolute right. Inspection of the books was not denied to him. His exercise of the right was controlled and regulated by being put under the supervision of a referee, so that no foreign and improper purposes should be subserved. He refused to accept the right with that restriction, and as it was proffered, and his sole ground of complaint, therefore, is the exercise by the Special Term of a discretionary power clearly granted by the Code. After he had refused to accept the terms lawfully imposed, the General Term had a right to renew the lost opportunity, or refuse to do so, and make the refusal effective by denying the inspection entirely, and its discretion in that respect we cannot review.

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

In the Matter of the Administration of the Estate of CHARLES
W. GODDARD, Deceased.

The exclusive right conferred by the provisions of the act of 1871 (§ 4, chap. 835, Laws of 1871) as amended by the act of 1877 (Chap. 154, Laws of 1877) upon the public administrator of the county of Kings to administer upon the estates of persons who die, leaving assets in that county, when "there shall be no widow, husband, or next of kin * * * resident in the State, entitled, competent, or willing to take out letters of administration," was limited by the provision of the act of 1877 (Chap. 883, Laws of 1877), conferring upon the Brooklyn Trust Company the capacity to act as executor or administrator, and upon courts and surrogates the power to issue letters of administration to it upon application of a party interested.

The said provision of the act last mentioned is permissive, not mandatory. The discretionary power so given was, however, so far as it relates to the

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county of Kings, taken away by the provisions of the act of 1882 (Chap. 124, Laws of 1882), providing that the public administrator of that county shall have the prior right to administration in the cases above specified.

The principle, that the provisions of a local or private act are not affected or repealed by the enactment of a subsequent general law, containing repugnant provisions, does not apply where both acts are either local or private; and the provisions of such an act are subject to be qualified, modified, or repealed by repugnant provisions in a subsequent local or private act.

(Argued January 15, 1884; decided January 29, 1884.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made September 10, 1883, which reversed two orders of the surrogate of the county of Kings, one of which denied an application for the appointment of the Brooklyn Trust Company as administrator of the estate of Charles W. Goddard, deceased; the other awarded letters of administration to the public administrator of that county.

The material facts are stated in the opinion.

Charles H. Otis for appellant. A special and local act of the legislature is not repealed, amended or in any way affected by a subsequent general act containing repugnant or inconsistent provisions, in the absence of an express repeal. (*Matter of Evergreens*, 47 N. Y. 216; *Matter of Comm'rs Central Park*, 50 id. 493, 496, 497; *Matter of D. & H. C. Co.*, 69 id. 209; *People v. Quigg*, 59 id. 83; *Vil. of Deposit v. Vail*, 5 Hun, 310; 70 N. Y. 287, 291; *Bennett v. Peck*, 28 Hun, 447.) Even if the Kings county surrogate had the power to grant administration to the Brooklyn Trust Company, under the amendment to its charter of 1877, this power was taken away again by the amendment of 1882, to the Public Administrators Act, which took effect on the passage of the amendatory act. (*Ely v. Hatton*, 15 N. Y. 595, 597, 599; *Moore v. Mansert*, 5 Lans. 173.) Even though the surrogate has the power to grant administration to the Brooklyn Trust Com-

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pany in the case at bar, the granting of administration is discretionary with him. (*Cooke v. State Nat. B'k of Boston*, 52 N. Y. 96, 105, 106; *Mount v. Mitchell*, 31 id. 356, 357; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101, 113, 114; *Mayor v. Furze*, 3 Hill, 612, 614, 615; *William v. People*, 24 N. Y. 405, 408; *Medbury v. Swan*, 46 id. 200; *People v. Supervisors*, 51 id. 401, 406; *Cook v. B'k of Boston*, 52 id. 96, 105; *People v. Batchellor*, 53 id. 128, 135; *People v. Supervisors*, 68 id. 114, 119; *Williams v. People*, 24 id. 405, 408.) The discretion exercised by the surrogate in the case at bar was not reviewable by the General Term of the Supreme Court. (*Wavel v. Wiles*, 24 N. Y. 635, 636; *Bowen v. Widner*, 12 Weekly Dig. 525; *Mount v. Mitchell*, 31 N. Y. 356, 362; *People v. N. Y. C. R. R. Co.*, 29 id. 418, 423; *Howell v. Mills*, 53 id. 322, 328; *Security B'k v. B'k of Commw.*, 2 Hun, 287, 290; *Martin v. Windsor Hotel Co.*, 70 N. Y. 101, 103; *Sprague v. Dunton*, 19 Hun, 490.)

James C. Bergen for respondent. Chapters 154 and 383 of the Laws of 1877 are *in pari materia*, and may be so construed as to give full effect to each. (*Smith v. People*, 47 N. Y. 339; *Power v. Shepard*, 48 id. 540; *McCarty v. Orphan Asylum Soc.*, 9 Cow. 437.) The Trust Company Acts, being private or special acts, are not repealed, amended or in any way affected by the Public Administrators Acts, which are general in their application. (*White v. Syr. and U. R. R. Co.*, 14 Barb. 563; 1 Blackst. Com. 86; 1 Dwarries on Statutes, 354; *People v. O'Brien*, 38 N. Y. 193; *Gaskin v. Mier*, 42 id. 186; *People v. Supervisors of Chautauqua*, 43 id. 16, 21; *Kerrigan v. Clement*, 68 id. 831; *In re the Evergreens*, 47 id. 216; *Vil. of Gloversville v. Howell*, 70 id. 287; *Bennett v. Peck*, 28 Hun, 447.) The power conferred upon surrogates in this State to appoint the Brooklyn Trust Company as administrator of the estate of deceased persons is one in the execution of which the public are interested, and involving the rights of persons authorized to seek its exercise, and the enabling statute is mandatory; and upon the presentation of

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the facts to the surrogates, authorizing them to act, they may not exercise their discretion, but must grant the application. (*Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 113, 114; *Mayor, etc., v. Furze*, 3 Hill, '615; *Hagadorn v. Rauz*, 72 N. Y. 586; *People, ex rel. Conway, v. Supervisors*, 68 id. 119; *People v. Supervisors of Otsego*, 36 How. Pr. 1; *Caswell v. Allen*, 7 Johns. 63.)

RUGER, Ch. J. The controversy involved in this appeal relates to the right to administer upon the estate of Charles W. Goddard, late a resident of the county of Kings, and who died therein on the 19th day of February, 1883, possessed of personal property of the value of about \$25,000. All of the adult next of kin petitioned the surrogate for the appointment of the Brooklyn Trust Company as the administrator of such estate. There were three of those persons, two of them residing in the county of Kings and one in the city of Chicago, State of Illinois.

This appointment was opposed by the public administrator in Kings county, upon the grounds, first, that he was, under the statutes relating to the subject, exclusively entitled to the administration of such estate; and, secondly, if he was not in law exclusively entitled to such administration, that it was still in the power of the surrogate, in the exercise of his discretion, to issue letters of administration upon such estate to such public administrator; and that the surrogate should order such an administration of the estate.

The surrogate, upon the hearing of the matter, determined that said public administrator had a right, prior to that of the Brooklyn Trust Company, to the administration of such estate; and further, that if discretionary power was vested in him to determine as to which of such claimants should be appointed, a proper exercise of such power required the appointment of the public administrator. From this determination of the surrogate, one of the petitioners, an adult resident daughter of the deceased, appealed to the General Term of the Supreme Court, which reversed the decision of the surrogate and re-

mitted the proceedings to him with directions to issue letters of administration to the Brooklyn Trust Company. From this order the public administrator appealed to this court.

The determination of the questions involved in the appeal requires the examination of the various statutes relating to the subject.

In the consideration of the statutes conferring power upon the Brooklyn Trust Company to administer upon the estates of deceased persons, and also those prescribing the power, rights and duties of the public administrator of Kings county, the principles involved in the proposition that the provisions of a special or local act are not affected or repealed by the enactment of a subsequent general law, containing repugnant provisions, have no application. Each of the acts referred to is either local or special, and private in its character, and is subject to be qualified, modified or repealed by subsequent legislative amendments thereto, containing provisions conflicting with the provisions of any prior law on the subject.

The acts conferring power upon the public administrator of Kings county are local, inasmuch as their operation is thereby limited and confined to the estates of persons dying within the limits of a single county of the State, or to the property of deceased persons being in such county, but who have died elsewhere. (*People v. O'Brien*, 33 N. Y. 193; *Gaskin v. Meek*, 42 id. 186; *People v. Supervisors of Chautauqua*, 43 id. 21.)

The acts conferring capacity upon the Brooklyn Trust Company to administer upon the estates of deceased persons, upon certain conditions named therein, are private acts, inasmuch as they are confined in their operation to a single corporation and may also quite appropriately be termed local, as from the nature of the duties which they are authorized to perform, and the residence of the institution, it could not reasonably have been contemplated that they would be called upon to administer upon estates outside of the county of their residence. (*White v. Syracuse and Utica R. R. Co.*, 14 Barb.

559; *Matter of the N. Y. Elevated R. R. Co.*, 70 N. Y. 350.)

By the general statutes of the State, surrogates in performing the duty of granting letters of administration upon the estates of deceased persons are required to issue them in accordance with the order of priority specified in the statutes, viz.: 1. To his widow; 2. To his children; 3. To the father; 4. To the mother; 5. To the brothers; 6. To the sisters; 7. To the grand-children; 8. To any other next of kin entitled to share in the distribution of the estate; 9. To the creditors. In the city of New York, the public administrator has preference in administration after the next of kin and over creditors. In other counties of the State the county treasurer has preference next after creditors. Over all other persons, as between persons in the same class and equally entitled to claim the right of administration, the surrogate has power, in his discretion, to prefer one person to another (*Taylor v. Delancy*, 2 Caine's Cases, 143; *Coope v. Lowerre*, 1 Barb. Ch. 45), but otherwise he cannot disregard the order of priority laid down by the statute, unless for some of the causes specified therein. (*Coope v. Lowerre*, 1 Barb. Ch. 45; *Harrison v. McMahon*, 1 Bradf. 283.) Administration cannot be granted out of the regular order, without a written renunciation or upon a citation to those having the prior right and their neglect to assert such right. (*Barber v. Converse*, 1 Redf. 330.) It has been held that the only method by which one in a prior class could preclude the appointment of a person in a subsequent class was by himself taking out and accepting letters of administration. (*In re Root*, 1 Redf. 257; *Sheldon v. Wright*, 5 N. Y. 497.) It was also held that if the next of kin renounce, the public administrator is entitled to letters, and that the next of kin could not appoint a substitute to the exclusion of such public administrator. (*Id.*)

These statutes continued applicable to the county of Kings until the enactment of chapter 335 of the Laws of 1871, whereby a public administrator was provided for such county, who was invested with absolute and sole authority to collect and take

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charge of the estates of deceased persons in the cases pointed out in that statute, and exercise the duties of administration upon them. This statute may be considered in connection with chapter 154 of the Laws of 1877 amending the same, and which conferred upon such public administrator *absolute and sole authority* to take charge of and administer upon such estates of deceased persons as should die leaving assets or effects in Kings county, when there was no "widow, husband or next of kin entitled to a distributive share in the estate of such intestate, resident in the State, entitled, competent or willing to take out letters of administration on such estate." The effect of these acts was to create a new class in the order of administration, and postpone it to the claims of a widow, husband or relative, resident in the State, and entitled, competent or willing to take out letters of administration, but to give it priority over all other claimants to such administration. (*In re Root, supra.*)

The exclusive right conferred by these acts upon the public administrator was undoubtedly limited and impaired by the authority granted to courts and surrogates by the provisions of chapter 383 of the Laws of 1877. By that act it was provided that said Trust Company shall have powers and capacity "to be appointed and to accept the appointment of executor of or trustee under any last will and testament, and of administration, with or without the will annexed, of the estate of any deceased person. Whenever application shall be made to any court of the State, or to a surrogate of any county, for letters testamentary on any last will and testament, by the terms of which said company is appointed executor thereof, the said court or surrogate *shall* grant letters testamentary thereon to said company. Whenever application shall be made to any court of this State, or to any surrogate of any county, for letters of administration upon the estate of any deceased person, with or without the will annexed, and it shall appear that there are no next of kin of the deceased entitled to a distributive share in the estate, qualified, competent or willing, or otherwise unable to accept such administration, said court or surro-

gate may, at the request of any party interested in the estate, whether as creditor or beneficiary, grant letters of administration on said estate to said company." This act seems to have accomplished these objects; in the first instance it conferred upon such Trust Company the capacity to act as a natural person in the performance of the duties of an executor or administrator. Secondly, it gave it the absolute and exclusive right to receive letters of administration upon the estate of a deceased person, in all cases where it was named in the will as the executor thereof. Thirdly, it conferred power upon courts or surrogates to issue letters of administration to such company upon the application of a party interested in the estate in cases where there were no next of kin of the deceased entitled to a distributive share in the estate, qualified, competent or willing, or otherwise unable to accept such administration. At this point a contention arises between the appellant and respondent as to the construction to be given to this provision of the act. The latter claiming that the word "may" in the statute should be construed to mean "shall," and to impose the duty upon the court or surrogate, imperatively, to make such appointment when requested by a party interested in the estate in all cases where the other conditions to the exercise of such power are shown to exist. We do not think this contention can be sustained.

The very section under consideration shows a discrimination by the legislature between the powers conferred, which were intended to operate imperatively, and those confided to their discretion. No valid reason seems to exist why such a change should be made in the phraseology of the section, if the character of the powers or duties to be performed by the court or officer under its several paragraphs were intended to be the same. The language of a statute must be construed according to its natural and ordinary signification unless some sufficient reason exists for a contrary interpretation. The object of this portion of the act seems to be to confer authority upon the tribunals named, to appoint the trust company to administer

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such estates coming within the provisions of the act as they should deem it advisable to do.

We do not think this case comes within the principle laid down in that class of cases where it is held that permissive language in a statute may be construed as imposing an imperative duty upon the officer authorized to act thereunder. (*Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 113; *People, ex rel. Conway, v. Supervisors*, 68 N. Y. 119; *Hagadorn v. Rauz*, 72 id. 586.) If the refusal of the officer to act in this case should result in the absolute omission of administration upon the estate of deceased persons a different question would be presented. The refusal of the court or surrogate to issue letters to the trust company in this case in no way affects the ultimate right of the petitioners, or any public right. The public are undoubtedly interested in the exercise by the courts of the power of administration over estates of deceased persons; but so far as that right was concerned it was as well satisfied by the appointment of one person as another, and the order for the distribution of the funds of the estate would not be changed or affected by the refusal of the surrogate to exercise the power of appointment in a particular way. It cannot, therefore, be said that either the next of kin or the public are interested in the exercise of the particular power conferred by this act in the sense that any legal right of theirs is impaired by the omission of the court or surrogate to appoint the Brooklyn Trust Company to administer this estate.

We have, therefore, arrived at the conclusion that the act in question conferred upon courts and surrogates discretionary power only to issue letters testamentary to the Brooklyn Trust Company in the cases provided for therein.

The exercise of the discretion thereby given to the surrogate is confined by the statute to that officer, and cannot be the subject of review in an appellate tribunal, unless there should appear an exercise of the power so gross and arbitrary as to amount to an abuse of a legal discretion.

We are, however, unable to see why this discretionary power

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was not entirely taken away from the surrogate by chapter 124 of the Laws of 1882.

This act expressly provides that the public administrator of Kings county shall have the *prior* right and authority to collect, take charge of and administer upon all such estates of deceased persons as "shall die leaving any assets and effects in the county of Kings, and there shall be no widow, husband or next of kin entitled to a distributive share in the estate of said intestate, resident in the State, entitled, competent or willing to take out letters of administration on such estate." In so far as chapter 383 of the Laws of 1877 purports to confer power upon courts and surrogates to issue letters of administration to the Brooklyn Trust Company in the cases provided for by this statute, it is repugnant thereto and must be deemed to have been repealed thereby.

The facts of this case bring it within the class wherein the public administrator of Kings county has been invested with the prior right of administration. We should have been gratified to have found a way by which a different result might have been arrived at. The equity of allowing persons entitled, to take by distribution the estate of a deceased person, to select the agency by which such distribution should be made, is so manifest that it ought not to be refused to them except in a case where its impropriety is clear and unmistakable. This, however, is a consideration which addresses itself to the legislative power alone, and we have no alternative but to declare the law as we find it.

The orders of the General Term must, therefore, be reversed and those of the surrogate affirmed, without costs of this appeal to either party as against the other in this court.

All concur.

Ordered accordingly.

Statement of case.

94	554
126	787
94	554
127	116

In the Matter of Proving the Last Will and Testament of
AMBROSE S. HIGGINS, deceased.

In proceedings for the probate of the will of H. it appeared that the testator presented the will, which was written by himself, to J., who drew the attestation clause and signed it as a subscribing witness, as did also S. The latter testified that the testator, in answer to questions of J., stated that the instrument was his last will and testament, and thereupon, at his request, the two witnesses signed their names in his presence and in the presence of each other, and that at that time it had been signed by the testator. J. testified he did not recollect all that occurred, but that the testator came to him with a paper which he thought was the one in question, and desired him to witness his will, and in answer to questions put by the witness he acknowledged it to be his last will and testament, and requested witness and S. to sign, and both did so in the presence of the testator and of each other; that he could not swear the testator said that was his signature. *Held*: the evidence sufficiently established the due execution of the will to authorize its admission to probate; and this, although other witnesses who were present contradicted the testimony of the subscribing witnesses.

(Argued January 16, 1884; decided January 29, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 2, 1882, which affirmed a decree of the surrogate of Cortland county, admitting to probate the will of Ambrose S. Higgins, deceased.

The facts are sufficiently stated in the opinion.

Eugene B. Travis for appellants. Probate of the will should be denied because the testator did not acknowledge its subscription to each of the attesting witnesses, and at the time declare it to be his last will and testament. (3 R. S. [7th ed., Throop] 2285.) A subscription of a will by a testator, after the witnesses have signed their names to it, is not a due execution of it by him. (*Sisters of Charity v. Kelly*, 67 N. Y. 413; *Jackson v. Jackson*, 39 id. 153; *Mitchell v. Mitchell*, 16 Hun, 97; 77 N. Y. 596; *Chaffee v. Baptist M. Soc.*, 10 Paige, 86; *Brinckerhoof v. Remsen*, 8 id. 488; *Rutherford v. Rutherford*, 1 Denio, 33.)

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Samuel Hand for respondent. The surrogate having passed upon the question of the execution of the will as to acknowledgment of the signature of the testator, upon conflicting evidence as a question of fact, and this decision having been affirmed at General Term, it is not the subject of review in this court. (*In re Ross*, 87 N. Y. 514; *Mark v. McGlynn*, 88 id. 369; *Davis v. Clark*, 87 id. 623.) Upon the uncontradicted evidence in the case the formalities of the statute were complied with, in the execution of the will, by the testator. (2 R. S. 63, § 40.) Mere want of recollection of one of the attesting witnesses cannot have any material weight against the positive and clear testimony of the other witness. (*In re Pepson's Will*, 91 N. Y. 255; *Rugg v. Rugg*, 83 id. 592; *In Goods of Holgate*, 1 Sw. & Trist. 261; *Brown v. Clark*, 77 N. Y. 369; *Neihlsell v. Toerge*, 4 Redf. 325; *Tarrant v. Ware*, 25 N. Y. 423; *Humphrey's Estate*, 1 Tuck. 142; 1 Williams on Executors [6th Am. ed.], 135; Code, § 2620; *Lawrence v. Norton*, 45 Barb. 448; *Neir v. Fitzgerald*, 2 Bradf. 71; *Lawyer v. Smith*, 8 Mich. 411; *Trustees of Auburn Theological Seminary v. Calhoun*, 62 Barb. 381; 25 N. Y. 422; *Dean v. Dean*, 27 Vt. 746; *Kirk v. Carr*, 54 Penn. St. 285; *Orser v. Orser*, 24 N. Y. 53.) The signature of the testator being visibly apparent on the face of the will to the attesting witnesses, and the testator having requested them to subscribe, and in express terms having acknowledged and declared to them the instrument so presented to be his will, this was a sufficient acknowledgment of his signature. (*Baskin v. Baskin*, 36 N. Y. 416; *Conboy v. Jennings*, 1 N. Y. Sup. Ct. 632; *Willis v. Mott*, 86 N. Y. 486; *Matter of Kellum*, 52 id. 517; 1 Williams on Executors [6th Am. ed.], 117; *McMillen v. McMillen*, 13 Weekly Dig. 350; *Inglesant v. Inglesant*, L. R., 3 P. & Div. 172; *Butler v. Benson*, 1 Barb. 526; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Nelson v. McGiffert*, 3 id. 158; *Robinson v. Smith*, 13 Abb. 359; *Hoysradt v. Kingman*, 22 N. Y. 372; *Coffin v. Coffin*, 23 id. 7; *Peck v. Cary*, 27 id. 9; *Goods of*

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Mary Warden, 2 Curteis, 334; *Gage v. Gage*, 3 id. 451; *Blake v. Knight*, id. 547.)

MILLER, J. The only question presented upon this appeal is whether the testator acknowledged his signature to his will to the subscribing witnesses at the time they signed the attestation clause. The proof shows that the testator drew up the will in his own handwriting, and brought it to one Jones, who drew up the attestation clause to the same. One of the witnesses, Stoker, testified that he was present at the time, and that Jones asked the testator if the signature to the will was his, and he replied that it was; that Jones then asked him if that was his last will and testament, and he said it was; that at that time it had been signed by the testator and that the two witnesses thereupon, at testator's request, signed their names in his presence and in the presence of each other. This witness' testimony shows that the statute was complied with strictly. The witness Jones testified that he did not recollect all that occurred, but that the testator came into his office with a paper which he thought was the will in controversy, and stated that he desired him to witness his will; that he asked him if he acknowledged the paper to be his last will and testament and the testator said he did; that he then asked him if he desired himself and Stoker to sign it as witnesses, and he said he did; that they both then signed it in the presence of each other and of the testator. On cross-examination this witness stated that he could not swear that the testator said that was his signature, but he swore he knew he acknowledged that it was his last will and testament. The most that can be claimed for the qualification thus made is, that the witness did not recollect, but as he had already sworn that the testator had declared the instrument to be his last will and testament, the last statement cannot be regarded as a qualification of what he had previously testified to. Even if there was a failure of recollection, inasmuch as one of the witnesses testified positively to the due execution of the will, such a want of recollection cannot materially affect the testimony which established

the legal making of the will. The authorities are numerous which sustain the position that where one witness testifies positively to the due execution of a will, the want of memory of another cannot overcome the positive testimony, and the proof will be regarded as sufficient. Aside from what has been already remarked, we think that the testimony of Jones, who swore positively that the testator acknowledged the will to be his last will and testament, was an acknowledgment of his signature, and sufficient, with the other evidence given by him, to establish a due execution of the will. The signature was plainly visible upon the instrument itself, and the testator having requested Jones and Stoker to subscribe their names to it as witnesses, and he having acknowledged the same to be his last will and testament, the statute was fully complied with in this respect within the decisions of this court.

It is insisted that the testimony of the subscribing witnesses was contradicted by persons who were present at the time. These witnesses had nothing to do with the execution of the will, were present accidentally and, the presumption is, did not give the same attention to what transpired as the subscribing witnesses did. Their testimony must be taken, therefore, with considerable allowance and is not entitled to the same weight as the evidence given by those whose business it was, and who were called upon to witness the execution of the will. Certainly such evidence, under no rule, can be held to be entitled to more consideration than the positive testimony of the subscribing witnesses. It is said that these outside witnesses corroborate the testimony of Jones, which, it is claimed, established the fact that the will was not signed by the testator at the time of the alleged execution of the same. As already indicated we do not so understand Jones' evidence. It clearly tends to establish the due execution of the will and the most that can be claimed under any circumstance is that there was a conflict of testimony, which it was the province of the surrogate to consider. As he has passed upon the question, as to the due execution of the will, as to the acknowledgment of the signature of the testator, upon conflicting evidence as a question of

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fact, and the General Term having affirmed his decision, it is not reviewable in this court. (*Marx v. McGlynn*, 88 N. Y. 369; *In re Ross*, 87 id. 515.)

The order of the General Term should be affirmed.

All concur.

Order affirmed.

In the Matter of the Estate of ELIZABETH McCARTER,
Deceased.

A petition presented to a surrogate set forth that J. was trustee under the will of McC.; that the petitioner was by the terms of the will entitled to the interest on the trust fund, which was so invested as to yield an annual income, of which at least \$337.50 was then in the hands of the trustee, and that he refused to pay it over, claiming that the petitioner had assigned his interest, which claim, the petitioner averred, was unfounded. *Held*, that the petition was sufficient to entitle the petitioner under the Code of Civil Procedure (§§ 2803, 2804) to an order for an accounting.

The answer did not deny the validity or legality of the petitioner's claim, but set up the pendency of an action in which the trustee was plaintiff and the petitioner and others were defendants, for the purpose of settling conflicting claims, alleged by the trustee to have been made upon the fund and its income. No proof was given in support of these allegations. *Held*, the facts stated did not in any way tend to show that the petitioner's claim was of doubtful validity, or that the action was necessary; but if this were otherwise, in the absence of the denial of validity or legality required by the Code (§ 2805), the pendency of the action was immaterial and was no bar to an accounting.

Also *held* that it was in the discretion of the Supreme Court to impose the costs of an unsuccessful appeal from the surrogate's decision upon the trustee personally.

Also, that upon affirmation here of the judgment of the General Term, the trustee should be charged with the costs.

(Argued January 17, 1884; decided February 5, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 17, 1883, which affirmed an order of the surrogate of the county of New York requiring Peter A. H.

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Jackson, as testamentary trustee under the will of Elizabeth McCarter, deceased, to file an account; also an order of said surrogate directing a reference on said accounts and appointing a referee; also the decree of the surrogate rendered upon the coming in of the report of the referee settling the accounts and directing payment. The General Term order also imposed the costs upon the trustee individually.

The facts, so far as material, are stated in the opinion.

H. M. Collyer for appellant. As the petition did not allege that the trustee had failed to apply the trust income to the use of the petitioner as directed by the will, the surrogate acquired no jurisdiction. (Code of Civil Pro., § 2807; *Costar v. Lorillard*, 14 Wend. 320; *Rogers v. Tilley*, 20 Barb. 639; *Leggett v. Perkins*, 2 N. Y. 297.) The citation should have been directed to the other persons interested in the fund as well as to the trustee. (Code of Civil Pro., § 2806.) As the petition showed on its face that the claim of the *cestui que trust* was disputed, the court had no jurisdiction. (Code of Civil Pro., § 2474; *Tucker v. Tucker*, 4 Abb. Ct. App. Dec. 425; *Cooper v. Felter*, 6 Lans. 485; *Andrews v. Wallege*, 8 Abb. Pr. 425.) The Surrogate's Court is one of limited jurisdiction, and it can only obtain jurisdiction by the existence of the facts prescribed by statute. (Code of Civil Pro., §§ 2472, 2474; *Staples v. Fairchild*, 3 N. Y. 41; *Seaman v. Whitehead*, 78 id. 306; *Riggs v. Cragg*, 87 id. 479; *Bevan v. Cooper*, 72 id. 317.) The proceedings should have been dismissed under the terms of the answer. (Code of Civil Pro., §§ 2805, 3345.) The surrogate had no jurisdiction to determine the respective rights of the *cestui que trust* and his family to the trust fund. (Code of Civil Pro., § 3472; *Redfield on Surrogates*, 21; *Cooper v. Felter*, 6 Lans. 485; *Andrews v. Wallege*, 8 Abb. Pr. 425; *Tucker v. Tucker*, 4 Abb. Ct. App. Dec. 425.) The *cestui que trust* was estopped from denying the legality of the application of the trust income by the trustee, the accounts having been rendered to him annually and received as accounts stated. (*Harley v. Eleventh Ward B'k*, 76 N. Y.

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618.) The assignment of the *cestui que trust* was good until disavowed, and was only inoperative from the time of the disavowal, and could not relate back to acts prior to that time. (*Van Hook v. Whitlock*, 26 Wend. 43, 54; *Welland Canal Co. v. Hathaway*, 8 id. 480, 483; *Pope v. O'Hara*, 48 N. Y. 456; *Kinnear v. Mackey*, 85 Ill. 96.) The rendition and filing of the annual accounts were proper and authorized by law, and made pursuant to the judgment of the Superior Court. (154th rule of the late Court of Chancery, rule 85 of the Supreme Court; *B'k of Niagara*, 6 Paige, 213; *Vanderheyden v. Same*, 2 id. 288; *Morgan v. Hannas*, 13 Abb. Pr. [N. S.] 369; *In re Kellogg*, 7 Paige, 265; *Fisher v. Fisher*, 1 Bradf. 337; *Billinger v. Shafer*, 2 Sandf. Ch. 293; Redfield on Surrogates, 653.) The right of the trustee to make annual rests in this case is *res adjudicata*, and cannot be altered by the surrogate now. (*Gardner v. Bucklie*, 3 Cow. 120; *Embury v. Connor*, 3 Comst. 522; *Demarest v. Darg*, 32 N. Y. 281; *Doty v. Brown*, 4 Comst. 71; *Castle v. Noyes*, 4 Kern. 329; *White v. Cotesworth*, 2 Seld. 137; *Wright v. Butler*, 6 Wend. 286; *Bouchard v. Dias*, 3 Denio, 238.) The court erred in holding that consent gave jurisdiction. Jurisdiction can only be acquired when the state of fact prescribed by statute exists. (*Riggs v. Cragg*, 89 N. Y. 479; *Dakin v. Demming*, 6 Paige, 65; *Tucker v. Tucker*, 4 Keyes, 136; 7 Wait's Actions and Defenses, 192; *Dudley v. Mayhew*, 3 N. Y. 9; *Beach v. Nixon*, 9 id. 36; *Schoonmaker v. Clearwater, etc.*, 41 Barb. 200; *Bagley v. Briggs*, 56 N. Y. 407; *Chipman v. Montgomery*, 63 id. 221.) The amounts paid by the trustee for taxes and insurance were improperly disallowed by the surrogate. (Dayton on Surrogates, 513.)

Charles H. Winfield for respondent. The surrogate had jurisdiction, and these proceedings in his court were authorized by sections 2803, 2804, 2820, Code of Civil Procedure. The so-called assignments were void, and did not operate to divest the *cestui que trust* of his income, or of the right to an

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accounting. (2 R. S. [6th ed.], § 76, p. 1110; p. 1167, § 2; *Graff v. Bonnett*, 31 N. Y. 9; *Williams v. Thorn*, 70 id. 270.) The so-called annual accounts were a mere cover for increased commissions, and not made pursuant to any statutory requirement, or rule or order of any court. (*Cram v. Cram*, 2 Redf. 244.) As no vouchers accompanied the accounts of the trustee, none were offered in evidence, and no proof was given as to any of the alleged payments; all objected to should have been disallowed. (Code of Civil Pro., §§ 2734, 2811.) The several deductions made by the appellant annually as his commissions were properly disallowed. Commissions are to be allowed on the settlement of the account by the surrogate. (3 R. S. [6th ed.], § 73, p. 101; *Mecham v. Stearns*, 9 Paige, 398-403.) The appellant should be charged personally with the costs and disbursements, both in this court and in the court below. (*Sheehan v. Huerstel*, 9 Weekly Dig. 284; Code of Civil Pro., § 2558; *Lawrence v. Lindsay*, 70 N. Y. 566; *Chapman v. Montgomery*, 63 id. 221.)

DANFORTH, J. There is no merit in this appeal. The appellant is a testamentary trustee under the will of Mrs. McCarter, and the petitioner a person interested in the trust fund. He was, therefore, upon presenting a proper petition, entitled to an order directing the trustee to account (Code of Civil Pro., §§ 2803, 2804), and for that purpose the petition was sufficient. It set out the facts already adverted to, alleged that the petitioner was, by the terms of the will, entitled to the interest arising from the trust fund, that it was so invested as to yield an annual income, of which at least \$337.75 was then in the hands of the trustee, and that he refused to pay it over to the petitioner; that more than one year had elapsed since the probate of the will, and that there had been no judicial settlement of the account of the trustee.

The answer of the trustee to this petition denied neither the validity nor legality of the claim, and it, therefore, became the duty of the surrogate to hear the allegations and proofs of the parties, and make such decree in the premises as should be right. (§ 2805.)

It is true, as the appellant now says, that the petitioner also set out a claim on the part of the trustee that the petitioner had deprived himself of any right in the fund by assignment of the same, but the petition at the same time says that the assertion is unfounded. The answer also set up in bar an action pending in the Supreme Court, in which the trustee is plaintiff, and the beneficiary and others are defendants, for the purpose of settling conflicting claims, alleged by him to have been made upon the fund and its income. No proof was given in support of the allegation, nor does it, or the facts referred to in the pleadings, in any way tend to prove that the petitioner's claim was of doubtful validity. There is nothing to show that the action was necessary, or even brought in good faith. But if it was otherwise, in the absence of that denial which the Code (§ 2805) requires, its pendency was of no importance. (*Hurlburt v. Durant*, 88 N. Y. 121; *Fiester v. Shepard*, 92 id. 251.) These cases give construction to a statute relating to the liability of executors under similar circumstances, and are conclusive here. There was, therefore, no ground on which the surrogate could refuse to entertain the proceeding, and his order that the trustee account cannot be said to be one which justice did not require. (§ 2805.)

Nor was there any error in the final order after the account was taken. The exceptions of the trustee to the disallowance of items, and to the decree then made, have, however, been considered by the surrogate and General Term, and require no additional comment.

As to costs it was within the discretion of the Supreme Court to impose the costs of the appeal upon the trustee, whose conduct had occasioned them, and, we think, he, and not the trust fund, should bear the further burden of this unsuccessful appeal from its decision.

The judgment of the court below should therefore be in all things affirmed, with costs to be paid by the appellant personally.

All concur.

Judgment accordingly.

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WILLIAM E. KENYON, Appellant, v. JAMES S. SEE et al., Executors, etc., Respondents.

94	563
134	319
94	563
170	1608
171	155

As a general rule contingent interests are assignable, devisable and descendible the same as vested interests.

The will of M. gave to S. M. one-third of his residuary estate, in trust, to pay the interest thereof to S. H., on condition that he shall renounce the Roman Catholic priesthood, and gave to him the principal and accumulated interest on condition that he shall marry. In case of the death of S. H. before marriage such share was given to S. M. "at the time of his marriage." S. H. executed an assignment and release of all his interest to S. M.; the latter married, and thereafter died leaving a will; S. H. is still living. *Held*, that the conditions attached to the gift to S. H. were conditions precedent, and until performance he took no vested estate or interest, legal or equitable, in either the principal or income of the fund; that the alternative gift to S. M. was also conditional; that his contingent interest however did not lapse upon his death, but survived and was transmissible, and passed to his representatives, who, in case of the death of S. H. before marriage, will be entitled to the fund.

As to whether in case of the marriage of S. H. he would be entitled to the fund, or whether the attempted transfer will operate by way of estoppel, *quære*.

(Argued January 18, 1884; decided February 5, 1884.)

APPEAL by William E. Kenyon from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 13, 1883, which affirmed a decree of the surrogate of Westchester county, upon the accounting of the executors of the will of John Milderberger, deceased. (Reported below, 29 Hun, 212.)

The testator died in 1871 leaving real and personal property. The material provisions of his will are as follows:

"*Sixth*. After my death, I hereby order and direct my executors hereinafter named to invest all the rest, residue and remainder of my real and personal property on bonds and mortgages in the county of Westchester on property worth double the amount, with interest at seven per cent, payable half yearly, farms being preferred, said interest to accumulate until such times as are hereinafter named.

"*Seventh*. I give, devise and bequeath to my grandson,

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Selden Milderberger Spencer, one-third of all my real and personal estate, not hereinbefore disposed of, to be paid to him at the time of his marriage.

"*Eighth.* I give, devise and bequeath unto my said grandson, Selden Milderberger Spencer, at the time of his marriage, one other third of my real and personal estate, not hereinbefore disposed of *in trust*, to pay the interest thereof semi-annually, to my grandson Seymour Hobart Spencer, upon the express condition that the said Seymour Hobart Spencer shall renounce the Roman Catholic priesthood, said payment of interest to commence at the time of such renunciation, and upon the further condition that the said Seymour Hobart Spencer shall marry, I give, devise and bequeath the said money held in trust, together with the accumulated interest thereon, to my said grandson, Seymour Hobart Spencer.

"*Ninth.* I give, devise and bequeath the one other remaining third of all my real and personal property not hereinbefore disposed of, to my other grandson, William Edward Kenyon, at the time of his marriage.

"*Tenth.* In case of the death of the said Seymour Hobart Spencer before marriage, I give, devise and bequeath his said share to my grandson, Selden Milderberger Spencer, at the time of his marriage.

"*Eleventh.* And in case of the death of the said Selden Milderberger Spencer before marriage, I give and devise his said share or shares to my said grandson, William Edward Kenyon.

"*Twelfth.* And in case of the death of said William Edward Kenyon before marriage, I give, devise and bequeath his said share or shares to Selden Milderberger Spencer, if he should be living and married, if not living, I give, devise and bequeath the same to the children of my sister, Hester Ann Lee, wife of Dr. Charles A. Lee, of Peekskill, N. Y., share and shares alike.

"*Thirteenth.* In case of the death of my said three grandchildren before marriage, I give, devise and bequeath all of said three shares of my real and personal estate to the children

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of my sister, Hester Ann Lee, wife of Dr. Charles A. Lee, of Peekskill, N. Y., share and shares alike.

"*Fourteenth.* I do hereby authorize and empower my executors hereinafter named to sell all or any of my real estate, and to give good and sufficient deeds therefor."

W. E. Kenyon married in 1879, and shortly thereafter received his one-third. On September 2, 1881, Selden M. Spencer married. On the 15th of the same month Seymour executed an instrument, under seal, which purported to release and assign all his rights under the will to Selden, and on the same day, the executors paid to Selden \$28,000, on account of the two shares. Afterward, on the 26th of the same month, Selden died, leaving a last will and testament, which has been duly admitted to probate, the executors of which claim that they are entitled to receive from the executors of John Milderberger's will the residue in their hands, as well by virtue of that will as of Seymour's assignment.

On behalf of the executors of Milderberger, it was claimed, among other things, that Seymour had no assignable interest, and that the fund must remain in the hands of a trustee, to be appointed by the court, to await the performance of the conditions by Seymour. On the part of Seymour it was insisted, that as it was personal estate, if it should be determined that nothing passed by the assignment, the executors of Selden were entitled to the fund. On the part of the appellant Kenyon, it was claimed that no interest in Seymour's one-third passed to the executors of Selden on his death, but that it continues a trust fund, and the gift will lapse in case of the death of Seymour before marriage.

John A. Husted for appellant. A condition precedent must happen before Selden M. could be vested with Seymour's share, and, not having happened, the share did not vest in Selden M. at the time of his marriage. (*Carr v. Robertson*, 1 Seld. 125-134.) The death before marriage of Seymour H. is a condition precedent, the performance of which is necessary to vest the legacy; if the legatees die before that period his personal

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representatives will not be entitled to it. (Willard on Executors, 356; Preston on Legacies, 104; 2 P. Wms. 610, 612; 1 Seld. 125-134; *Smith v. Edwards*, 88 N. Y. 92; *Delaney v. McCormic*, id. 174.)

Charles B. Alexander for executors of Selden M. Spencer, respondents. The intent of the testator was that the portion of the estate mentioned in the eighth and tenth clauses of the will should vest in Selden upon his marriage as an estate in expectancy; and that if Seymour did not comply with the condition, Selden or his heirs should take. (*Moore v. Lyons*, 25 Wend. 119; *Stevenson v. Lesley*, 70 N. Y. 512; *Williamson v. Field*, 2 Sandf. Ch. 553; *Matter of Meyer*, 57 How. Pr. 206; *Patterson v. Ellis*, 11 Wend. 293; *Kane v. Astor*, 5 Seld. 113.) On the marriage of Selden he took an estate in expectancy in the form of a vested contingent remainder, vesting in interest at the time of his marriage, descendible, devisable and alienable, but subject to being divested by Seymour's renunciation of the priesthood and marriage. (R. S., part 2, chap. 1, tit. 2, art. 1, § 13; R. S. [Banks' 7th ed.], part 2, chap. 4, art. 3, tit. 4, § 2, p. 2256; *Hennesy v. Patterson*, 85 N. Y. 91; *Moore v. Little*, 41 id. 72, 76; *Manice v. Manice*, 43 id. 380; *Lawrence v. Bayard*, 7 Paige, 75; *Mead v. Mitchell*, 17 N. Y. 210.) The execution and delivery of the assignment from Seymour to Selden destroyed the trust and enlarged the estate to a full estate in Selden, either as an equitable assignment or by estoppel. (*Miller v. Emans*, 19 N. Y. 385; *Ham v. Van Orden*, 8½ id. 257; Thomas' Coke, note f, 456; Litt. § 446.) It was not necessary that Seymour should have a vested interest. He could assign his right to perform the conditions and take the estate, to one having a vested interest, and the agreement could at least be enforced in equity, even if he in the future complied with the condition. (*Field v. Mayor*, 6 N. Y. 186; *Miller v. Emans*, 19 id. 385; *Bean v. Welch*, 17 Ala. 773; *Williams v. Ingersoll*, 89 N. Y. 518.)

L. T. Yale for executors of John Milderberger, respondents. The conditions of the will were valid. (*Hull v. Hull*, 24 N.

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Y. 651; Roper on Legacies, 834, 859.) Seymour H. Spencer had no vested assignable interest under the will. (*Sweet v. Chase*, 2 N. Y. 80; 1 Roper on Legacies, 644, 656; *Neal v. Hanbury*, 1 Roper, 637; *Chipman v. Montgomery*, 63 N. Y. 231-2; *Jacobs v. Miller*, 27 Alb. L. J. 335.) The executors of the will of Selden M. Spencer do not succeed to the trust which vested in him at the time of his marriage. (*Delany v. McCormick*, 14 N. Y. Weekly Dig. 399.) Upon proper application, the Surrogate's Court not only had the power, but it was the duty of the court to appoint a successor to the deceased trustee. (*Mayor, etc., of N. Y. v. Furze*, 3 Hill, 615.)

ANDREWS, J. Seymour H. Spencer took no vested estate or interest in the principal or income of the fund given in trust to Selden M. Spencer by the *eighth* clause of the will of the testator, John Milderberger. The right to either was conditional. He was entitled to the income only upon and from his renunciation of the Roman Catholic priesthood, and to the principal only upon his marriage. The conditions were precedent, and, until performance, he took no interest, legal or equitable, in the fund. The *tenth* clause makes an alternative gift of the trust estate to Selden M. upon his marriage, in case of the death of Seymour H., without having married. This gift was conditional also, there being a double condition, *first*, the death of Seymour H. before his marriage, and *second*, the marriage of Selden M. If the contingent interest of Selden M. did not lapse upon his death before Seymour H., or in other words, if it survived and was transmissible like a vested interest, then the appellant must fail, as he has no interest which can be affected by the decree of the surrogate. We think this contingent right passed on the death of Selden M. to his representatives, and that, on the death of Seymour H. before marriage, they will be entitled to the fund. The survivorship of Selden M. is no part of the contingency upon which the gift to him is limited. The testator, as the will indicates, intended to make a complete disposition of his property. The alternative dis-

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position was made to meet the contingency that Seymour H. might not accept the conditions upon which the gift to him depended. There is no reason to suppose that the testator intended to confine the benefit of this provision to Selden M. personally, and to exclude his family or descendants when he made marriage one of the conditions of his taking at all. If the continued existence of the legatee, in case of a contingent legacy, is part of the contingency upon which the gift is limited, then there can be no doubt. But in this case the personal enjoyment of the legacy by Selden M. was not made essential to its taking effect. The general rule is that contingent interests are assignable, devisable and descendible. "In general," says Fearne, "it seems that contingent interests pass to the real and personal representatives, according to the nature of such interests, as well as vested interests, so as to entitle such personal representatives to them when the contingencies happen." (Fearne on Cont. Rem. 364.) The rule stated by the learned author is supported by numerous authorities. (*Pinbury v. Elkin*, 1 P. Wms. 563; *King v. Withers*, Cas. Temp. Talb. 117; *Chancy v. Graydon*, 2 Atk. 616; *Barnes v. Allen*, 1 Bro. Ch. Rep. 181; *Winslow v. Goodwin*, 7 Metc. 363.)

Here one of the conditions upon which Selden M. was to take, viz., marriage, was performed before his death. The other condition, viz., the death of Seymour H. before marriage, has not happened. It may never happen, as Seymour H. may marry, however improbable this may be. If he does marry, then he will be entitled to the third part of the estate of the testator, under the will, unless his attempted transfer to Selden M. operates as an estoppel. In either event, whether Seymour H. takes, or the representatives of Selden M., the appellant has no interest. One of the two things will happen, and which is a matter with which he has no concern. No question is made as to the validity of the trust in the will of John Milderberger.

We think the case was properly disposed of by the surrogate, and that the judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

ANNA L. PECK, as Administratrix, etc., Respondent, v. JOHN
B. VALENTINE, Appellant.

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Upon the trial of an action against an agent, who had charge of certain business for his principal, for alleged embezzlement of moneys received on sales, and for the purpose of showing that defendant had not entered in his cash-book all the moneys received by him on sales, plaintiff called L., as a witness, who testified that he kept on a loose piece of paper an account from day to day of moneys received by defendant from cash sales during a period specified, which paper he gave to plaintiff, and that the entries therein were true statements of the transactions. Plaintiff then testified that he received the paper and had lost it, but that he copied the figures correctly in a memorandum-book, which he produced, and that the entries had not been altered. These entries were offered and received in evidence under objection. *Held* error; that the original writing was not one the contents of which, if lost, could be proved by secondary evidence.

It seems that the original memorandum, had it been produced, could have been used by L. to refresh his recollection; or if it failed so to do, upon his testifying that it was a true statement of facts known to him at the time of the transactions, it might have been read in evidence in connection with, and as auxiliary to, his testimony.

Peck v. Valentine (29 Hun, 668), reversed.

(Argued January 22, 1884; decided February 5, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 12, 1882, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Mem. of decision below, 29 Hun, 668.)

The complaint in this action alleged, in substance, that defendant was employed by J. Melner Peck, the original plaintiff and the present plaintiff's intestate, as his agent to conduct and carry on the lumber business at the lumber yard of said Peck; that said defendant sold a large quantity of lumber and received the pay therefor, for which he failed to account, but embezzled and converted the same to his own use.

The facts, so far as material, are stated in the opinion.

Josiah T. Marean for appellant. When a witness who once
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knew a material fact, to which he could now testify, but his memory of it has failed, swears that while he did remember he made a true statement of it in writing, he may be allowed to testify to the fact from the paper, it being produced and shown him, or the paper itself may be read in evidence as auxiliary to his testimony. (*Russell v. H. R. R. R. Co.*, 17 N. Y. 139; *Guy v. Mead*, 22 id. 464-5; *Cole v. Jessup*, 10 id. 96; *Merrill v. I. & O. R. R. Co.*, 16 Wend. 586; *Clute v. Small*, 17 id. 237; *Marley v. Schultz*, 29 N. Y. 346; *McCormick v. P. C. R. R. Co.*, 49 id. 315.) The contents of the memorandum however cannot be proved by a copy. (*Halsey v. Sinsebaugh*, 15 N. Y. 485; *Russell v. H. R. R. R. Co.*, 17 id. 139; *Howard v. McDonough*, 77 id. 592; *Driggs v. Smith*, 36 Sup. Ct. 283; 77 N. Y. 594; 1 Greenl. on Ev., § 437; *Gilchrist v. Brooklyn Y. M. A.*, 59 N. Y. 499.) Proof that Leggett could not then testify to the facts from memory was indispensable. (*Russell v. H. R. R. R. Co.*, 17 N. Y. 139; *Halsey v. Sinsebaugh*, 15 id. 485; *Howard v. McDonough*, 77 id. 592; *Driggs v. Smith*, 36 Sup. Ct. 283.) The introduction of the memorandum at all is only as a substitute for the reading of it to the jury by the witness himself, after he identifies it as his, and says he knows it to be true. (*Russell v. H. R. R. R. Co.*, 17 N. Y. 139-140.)

W. T. B. Milliken for respondent. The original memorandum, of which exhibit 13 was a copy, was admissible as evidence. (*Clark v. Vorce*, 15 Wend. 193; *Merrell v. I. & O. R. R. Co.*, 6 id. 596-598; *Cole v. Jessup*, 10 N. Y. 96; *B'k of Monroe v. Culon*, 2 Hill, 535; *Guy v. Mead*, 22 N. Y. 462; *Halsey v. Sinsebaugh*, 15 id. 487.) On proof of the loss of the original memorandum, the copy was admissible. (1 Greenleaf, § 84, 558; *Hildebrant v. Crawford*, 6 Lans. 507; *Adams v. People*, 3 Hun, 654.) If the objection was to the extraneous matter on the exhibit, or to the lack of proper foundation for its introduction, the same should have been specified. (*Mabbett v. White*, 12 N. Y. 451; *Hught v. People*, 50 id. 392; *Merritt v. Seaman*, 6 id. 168; *Requa v. Holmes*, 16 id. 193.) Unless it appear that the evidence admitted was material, the

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exception will not avail. (*Howard v. Willets*, 9 N. Y. 170; *Stephen v. People*, 4 Park. 396; *Porter v. Ruckman*, 38 N. Y. 210.) A general objection to the testimony of a witness cannot prevail if any part of it were competent. (*Richardson v. Wilkins*, 19 Barb. 510; *Graham v. Dunnigan*, 2 Bosw. 516; *Day v. Roth*, 18 N. Y. 448; *Levin v. Russel*, 42 id. 251.)

ANDREWS, J. The plaintiff, for the purpose of proving that the defendant had not entered in the cash-book all the moneys received by him from sales of lumber, called one Leggett as a witness, who testified that in July, 1879, he was employed by the plaintiff in his lumber yard, and kept on a loose piece of paper an account of moneys received by the defendant from sales of lumber from the 1st to the 18th of that month; that the entries were made each day continuously, except Sunday, and were correct; that he gave the paper to the plaintiff, and that the defendant never saw it. The plaintiff testified, that he received the memorandum from Leggett, and had lost it, but that he copied the figures correctly into a memorandum-book (which he produced) and that the entries had not been altered. The entries in the memorandum-book were then offered and received in evidence, under the defendant's objection.

We think the entries were not competent evidence. The original memorandum, if it had been produced, could have been used by Leggett to refresh his recollection; or if he had forgotten the facts stated, and could not on seeing the memorandum recall them, yet if he had been able to state that it was a true statement of the transactions, known to him at the time, it could have been read in evidence in connection with, and as auxiliary to his testimony. (*Guy v. Mead*, 22 N. Y. 462.) But the adverse party on production by the witness of the memorandum would have had the right of inspection and cross-examination, a right of great importance as a protection against fabricated evidence. (Stephens on Evidence, art. 136; COWEN, J., *Merrill v. Ithaca, etc., R. R. Co.*, 16 Wend. 600.) In this case the memorandum was not produced and Leggett

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was not sworn as to its contents, for the reason doubtless that he could not remember what it contained. The only evidence to connect the entries in the plaintiff's book with the original memorandum, or to establish the amount of money received by the defendant during the time stated, was the oath of the defendant that the entries were a true transcript from the memorandum in connection with the testimony of Leggett, that the memorandum was a true statement of the transactions at the time. The original memorandum was the mere declaration of Leggett in writing of certain facts observed by him. The case is not distinguishable in principle from what it would have been if there had been no memorandum and the plaintiff had been permitted to prove the oral representations of Leggett to him of the same facts. This would be mere hearsay, and the fact that the statement instead of being oral was written does not alter the character of the evidence. A similar question was presented in *Clute v. Small* (17 Wend. 238). The plaintiff in that case sought to prove an admission of the defendant made to the sheriff at the time of the service of the writ, and was permitted to prove the contents of a letter written by the sheriff to the plaintiff's attorneys on returning the process, in which he reported the admission made by the defendant. The letter was lost and the sheriff testified that he could not recollect the contents of the letter or what the defendant had said, but that what he wrote was undoubtedly as stated by the defendant. The evidence of the sheriff was held to be inadmissible, COWEN, J., saying: "There was only one of two ways in which he could be allowed to speak; that is, either from positive recollection or from seeing the letter and knowing it to be his own statement." And again: "The inquiry here was no more than the common one to a witness; would you have asserted such a matter unless it had been true? and on obtaining the witness' affirmative answer, going on to prove what he did say."

The substantive fact sought to be proved in this case was the receipt by defendant of moneys for which he had not accounted. It could be proved by any competent com-

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mon-law evidence. But the original memorandum of Leggett was not original or primary evidence to charge the defendant. It was not a writing *inter partes*, nor one creating rights or of which rights could be predicated, as a will, contract or deed; nor was it a record of transactions in the ordinary course of business, as books of account, nor a paper made by the defendant, or to which he was in any way privy. It was apparently a private statement of an exceptional transaction, made by an agent in aid of his memory, for the information of his principal. The facts stated were relevant and could be proved by any one who could testify to their existence, either directly, as matter of personal recollection, or from a memorandum made by him, which he could verify as true. The entries in the plaintiff's book were not authenticated by Leggett. Whether they were a correct transcript of his original memorandum depended solely upon the plaintiff's evidence. The original memorandum was not a writing the contents of which, if lost, could be proved by secondary evidence. The rule upon that subject relates to writings which are in their nature original evidence, and in case of loss, their contents are from necessity allowed to be proved by parol. We think the admission of the entries from the plaintiff's book was not justified by any rule heretofore established, and to extend the rule so as to admit a copy of a memorandum not in its nature original evidence of the facts recorded, and not verified by the party who made the original and knew the facts, would open the door to mistake, uncertainty and fraud, a consequence far more serious than would flow from a restriction which in a particular instance might seem to prevent the ascertainment of truth.

For the error in admitting the entries the judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed. .

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In the Matter of the Application for the Final Accounting of
JOHN M. MACAULAY, Executor, etc.

The verification to a petition upon which a citation was issued by a surrogate, requiring an executor to show cause why he should not file an inventory, render and settle his accounts and pay a legacy, stated that the petitioner "knows the contents thereof, and that the same are true." *Held*, that this was equivalent to saying that they are true, to the knowledge of deponent; and so, that there was a substantial compliance with the provisions of the Code of Civil Procedure. (§§ 2534, 526.)

The executor was a non-resident. The surrogate made an order directing service of the citation either personally without the State or by publication. Less than six weeks intervened between the day the citation was issued and the day named therein for the return thereof. It was served personally in another State more than thirty days before the return day. *Held*, that the service was sufficient (Code, § 2525); that as service by publication was not resorted to, it was not requisite that the six weeks required for publication should intervene, nor was it necessary to publish the citation in the State paper, as that is only required when service is by publication. (§ 2536.)

An answer of an executor to a petition requiring him to pay a legacy, which simply denies the validity or legality of the petitioner's claim, is not sufficient to require the surrogate to dismiss the petition; it must also set forth facts showing that the claim is doubtful.

The provision of the said Code, requiring the surrogate to dismiss such a petition when it is not proved to the satisfaction of the surrogate that there are assets applicable to the payment of the claim of the petitioner, which may be so applied without injuriously affecting the rights of others (§ 2718, subd. 2), does not require a reference to that subject in the petition, or that proof shall be made before the issuing of an order requiring an accounting; but upon return of the citation, if issued upon a petition showing the petitioner to be entitled to a legacy, and that more than a year has elapsed since letters testamentary were issued (§ 2717, subd. 2), the surrogate is authorized to make the order requiring the executor to account (§ 2723, subd. 3); and when that is complied with, if the surrogate is not satisfied that there are in the hands of the executor assets properly applicable to the payment of the petitioner's claim it is his duty to dismiss the petition.

(Argued January 25, 1884; decided February 5, 1884.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made September 11, 1882, which affirmed an order of the surrogate of the county of Dutchess. (Reported below, 27 Hun, 577.)

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Letitia A. Jones presented a petition to said surrogate, stating in substance that Emma Louisa Van Allen was a legatee under the will of Isaac C. Van Wyck, deceased; that said Emma is dead and the legacy has been duly assigned by her heirs at law and next of kin to the petitioner who has also been duly appointed administratrix of her estate; that more than eighteen months have elapsed since the granting of letters testamentary to John M. Macaulay, the executor named in the said will; that the deceased left a large amount of property, real and personal, which has been sold and the proceeds received by the executor; that the executor has filed no inventory and has not paid the legacy. The verification to the petition stated that the petitioner "knows the contents thereof, and that the same are true except as to those matters therein alleged to be stated on information and belief, and as to those matters she believes it to be true." Upon this petition a citation was issued dated December 30, 1881, requiring the petitioner to show cause on February 8, 1882, why he should not file an inventory, render and settle his accounts and pay the said legacy. The surrogate on proof that said executor was a non-resident, ordered the citation to be served upon him by delivering a copy to him personally out of the State or by publication; it was served personally in the State of New Jersey, January 9, 1882. Upon the return day the executor appeared by counsel who filed an answer which stated that he appeared "specially and solely to make preliminary objections to the petition and citation, and to the jurisdiction of the surrogate." The paper then stated these objections which were substantially, that the return day of the petition was less than six weeks from its date; that the petition was not verified according to law; that the citation did not conform to either sections 2717 and 2718, or to section 2726 of the Code of Civil Procedure, but combines the two procedures, and that they may not be so united; also that it was not proved by the petition or otherwise "that there is money or other personal property of this estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied without

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injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction," and that therefore it was the duty of the surrogate to dismiss the petition. The answer then denied the assignment, or that petitioner owned or was entitled to the legacy to Emma Louisa Van Allen, and alleged that the same belongs to and is payable only to her administrators or executors. It also denied "the validity of the claim of said petitioner, and * * * the legality of said claim." The surrogate denied the motion to dismiss the petition, and ordered said executor to file a verified statement of the personal property which came into his hands, the value thereof and what disposition had been made of it and its proceeds.

Chas. M. Hall for appellant. As the petition herein did not pray for a judicial settlement of the account, or that the executor be cited to show cause why he should not render and settle his account, it cannot be deemed a petition presented under the provisions of the Code of Civil Procedure. (§§ 2717, 2726, 2514, subd. 8.) Under the mandatory provisions of section 2718, subdivision 2 of the Code, it was, in this case, the imperative duty of the surrogate to "dismiss the petition" without prejudice to an action or accounting on behalf of the petitioner. (*Fiester v. Shepard*, 92 N. Y. 251; *Hurlburt v. Durant*, 88 id. 121; *Dayton on Surrogates* [3d ed.], 455.) If a distributee, having a vested right, dies before distribution, the share is to be paid to his executors or administrators. (Redfield's Sur. Ct. Pr., 590, 591, 600; *Matter of Black*, 1 Tuck. 145; *Ross v. Clark*, 8 Paige, 574.) The order for the service of the citation, and the alleged service in New Jersey were defective, and the surrogate acquired thereby no jurisdiction of the executor, or to do any act, because under section 2524 the return day of citation must be at least forty-two days off. (*Market Nat. B'k v. Pacific Nat. B'k*, 89 N. Y. 397.) An appearance by defendant in an action will not be held to waive defects in service of process, unless a general appearance is entered, or some act, amounting to an appearance, is done, not referring

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to the particular right or remedy to be saved by a special appearance. (*Brett v. Brown*, 13 Abb. [N. S.], 295; *Lake v. Kels*, 11 id. 37; *Seymour v. Judd*, 2 Comst. 464; *Wheelock v. Lee*, 5 Abb. N. O. 72; *Merkle v. City, etc.*, 13 Hun, 157; *Braineck v. Knick., etc.*, 1 Abb. N. C. 393; *Sullivan v. Frazer*, 4 Rob. 616.)

H. H. Hustis for respondent. The surrogate may by order direct the service of citation by publication on a non-resident of the State, or at the option of the petitioner by delivering a copy of the citation without the State to each person so named or described in person. (Code of Civil Pro., § 2524.) A party who comes into court to make a special appearance is supposed to come for that particular purpose, and when that is accomplished, to quit it. (*Seymour v. Judd*, 2 N. Y. 464.) The petitioner was entitled to an accounting of this estate in order to ascertain the amount due Mrs. Van Allen. (Code of Civil Pro., §§ 2717, 2723.)

DANFORTH, J. It is not denied that the surrogate had jurisdiction over the subject matter, nor that the citation, if properly served was sufficient to require the executor of the will of Isaac Van Wyck, to show cause why he should not file an inventory of the estate, and render and settle his accounts, and pay the legacy bequeathed by the testator to Emma Louisa Van Allen. Whether it was properly issued and served, and jurisdiction acquired over the executor, and if so whether upon his answer the surrogate erred in refusing to dismiss the proceeding, are the questions raised by this appeal.

First. The petition on which the citation was granted showed that more than one year had expired since letters testamentary were issued: that as executor, the defendant received property of the testator, and that the petitioner was interested in the estate. This was sufficient, if properly verified, to give the surrogate jurisdiction to entertain the application for payment.

The appellant objects to the verification. We think it was sufficient. The affiant declares that "she knows the contents"

of the petition "and that the same are true." This is equivalent to saying that "they are true to her knowledge," and although the latter expression would more closely conform to the exact letter of the provision (§ 526), made applicable to the verification of a petition in Surrogates' Courts (§ 2534), the one adopted is the same in substance, and nothing more is required.

Second. The citation was well served. The Code (§§ 2521, 2522) provides for service upon a non-resident, either personally without the State, or by publication. The order of the surrogate followed these directions, and the service was in fact made personally in the State of New Jersey, on the 9th day of January, 1882. This was thirty days before the return day and was sufficient (§2525). It is true as the appellant claims that as less than six weeks could intervene between the day of issue and the day named for the return of the citation, service by publication would not have answered the purpose; but that mode of service was not resorted to, and for the same reason publication in the State paper, under section 2536, was unnecessary. That act is required only when service is in fact by publication, and when made, is in addition to publication in local papers. When no such publication is made, the requirement has no force, and its observance is not needed when actual personal service is effected.

Third. The answer of the defendant was not one which required the surrogate to dismiss the proceedings, under section 2718. It contained no denial of the allegations that by the will of Van Wyck, a legacy was given to Van Allen; that the petitioner was her administratrix; that assets had come to the hands of the executor, and that the legacy was not paid; nor did it state any fact that makes it doubtful whether the claim of the petitioner was valid or legal. On the contrary it sets out the death of the legatee, and avers that the legacy belongs to, and is payable to her administratrix. It is unimportant that the petitioner, in addition to her title as administratrix, also sets out an assignment from the heirs and next of kin of Van Allen, of their interest in the legacy, and that this is

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put in issue. It cannot prejudice her title as administratrix. It is not enough simply to deny the validity or legality of a claim so presented; the answer must set forth facts to show that it is doubtful, and as they were lacking, the case was not brought within subdivision 1 of section 2718, of the Code.

It is also objected by the appellant that the petition should have been dismissed because it was not proved that there was money or other personal property applicable to the payment of the claim in question. This stands on the second subdivision of the same section. (§ 2718.) The objection, however, is premature. Before the Code, and in proceedings under the Revised Statutes (Vol. 1, p. 116, § 18, T. 5, p. 11, chap. 6, art. 1), to obtain a decree against an executor for the payment of debts and legacies, it was held that the authority of the surrogate to make such decree should be exercised in conformity with the general principles of equity among creditors, and only in cases where the payment sought for could be made consistently with the rights of all parties interested (*Thomson v. Taylor*, 71 N. Y. 217), and that before making the decree he would necessarily inquire into the condition of the estate. The principle upon which that decision stands is now expressed in the section above referred to. (§ 2718, subd. 2.) And although the surrogate entertains the petition, he is not as of course to direct payment of the debt, but "is to make such a decree in the premises as justice requires." To do this he must in some way ascertain the condition of the estate, and so much is implied by section 2718, subdivision 2, which requires a dismissal of the petition when it is not found to his satisfaction that there is money or effects applicable to the claim of the petitioner, and that it can be paid without injuriously affecting the prior claims of others. The petition is not required to refer to that subject, and the course adopted in this instance was the proper one.

The surrogate is authorized by section 2723, subdivision 3, of the Code, to make an order requiring an executor to render an account "upon the return of a citation issued upon the petition," among others, "of a person entitled

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to a legacy" * * * praying for a decree directing payment thereof, as prescribed in section 2717, *supra*. The order made in this case is to that effect. It requires a statement of the accounts and proceedings of the executor, and when that is rendered, if it does not appear to the satisfaction of the surrogate that there are in the hands of the executor assets applicable to the payment or satisfaction of the petitioner's claim, under the conditions of section 2718, it may be his duty to dismiss the petition.

We do not find that any error was committed by the surrogate in entertaining the proceedings or making the order appealed from. It was therefore properly affirmed by the Supreme Court.

The order of the Supreme Court should be affirmed with costs to be paid by the appellant personally.

All concur.

Order affirmed.

ADOLPH HELLENBERG, as Executor, etc., Appellant, v. DISTRICT NUMBER ONE OF THE INDEPENDENT ORDER OF B'NAI BERTH, Respondent.

In 1873 L., plaintiff's testator, became a member of the corporation defendant. By its by-laws, in force at the time, it was provided that upon the death of a member, "the sum of one thousand dollars, collected by contributions from all the lodges in this district, shall be paid to the wife of the deceased, if living, and, if dead, to his children, and, if there are none, then to such person as he may have formally designated to his said lodge prior to his decease," said sum to be collected by assessments upon the lodges in the district. The testator, having no wife or children, designated his mother as the beneficiary. The designation described the payment directed as "the \$1,000, my heirs are to receive." The mother died before the testator, and no other designation in the manner specified was made. In an action to recover said sum, *held* that the testator had no interest in the fund which could descend, or upon which a will could operate, but simply a power of appointment which, if not exercised prior to his death, in the manner specified, became inoperative; and that, as the beneficiary named died before him, and no other designation was made as prescribed, defendant was not bound to pay to

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any one ; that the reference to " heirs " in the designation could not be interpreted as making them the recipients, but was only matter of description.

The will of L. bequeathed the sum in question to his mother or, in the event of her death, to his brother. This was in no manner brought to defendant's knowledge until after the testator's death. *Held*, that this did not operate as a new designation.

Catholic Mut. Ben. Ass'n v. Priest (46 Mich. 429), *Ex. Aid Society v. Lewis* (9 Mo. Appeal, 412), *Erdmann v. Mut. Ins. Co., etc.* (44 Wis. 376), *Roswell v. Eq. Aid Union* (18 Fed. Rep. 840), distinguished.

(Argued January 25, 1884 ; decided February 5, 1884.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made at the March term, 1883, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.

This action was brought by plaintiff as executor of the will of Isaac Lowenstein, deceased, to recover an endowment alleged to be due under the charter and by-laws of defendant, a corporation organized under chapter 188, Laws of 1878. Lowenstein became a member of the corporation defendant in 1871. At that time among its by-laws as the following :

" SECTION 1. — In case of the death of a member entitled to the full rights of a lodge in this district, the sum of one thousand dollars (\$1,000) collected by regular contributions from all the lodges in this district shall be paid to the wife of the deceased if living and if dead to his children, and if there are none then to such person or persons as he may have formally designated to his said lodge prior to his decease."

In October, 1874, Lowenstein left with his lodge a declaration as follows : " The \$1,000 my heirs are to receive of the district 1, I. O. B. B. I give to my mother Rika Lowenstein." In April, 1877, he executed his will which contained this bequest to his mother, " the sum of \$1,000, or such other sum as may be payable to my representatives " from defendant ; in case of the death of his mother prior to his decease, he gave to his brother Levy Lowenstein. The testator's mother died in November, 1877, he died in April, 1880, unmarried, and having no children and being a member of defendant in good

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standing. Prior to his death defendant's by-laws had been changed and those in force at the time of his death, so far as they relate to the controversy, were as follows :

"SECTION 1. A fund which shall be known under the name of 'Widow and Orphan Fund of District No. 1, I. O. B. B.' is hereby created, to assist widows and orphans of deceased brethren of this district. Each and every member of a lodge in the district shall contribute equally to this fund and shall be entitled to its benefits.

"§ 2. The object of this fund shall be to secure the sum of \$1,000, after the death of a member, collected by uniform contributions from all lodges, and this amount shall be paid, in the first instance, to his wife or children as herein provided by section 6 ; or secondly, if she be dead, to his children, or thirdly, if he leaves no children, to his father, or fourthly, to his mother. No other person shall be entitled thereto, unless a brother shall have so designated in writing to his lodge as hereinafter provided.

"§ 3. Every lodge is in duty bound to keep a book, in which each member may, and every unmarried member without parents, or widower without children or parents, shall declare to whom the amount designated in these laws shall be paid after his decease. These declarations shall be witnessed by a brother of the lodge.

"In this manner such brother shall have the right to bequeath said amount to any person or persons other than provided in section 2, or to any charitable institutions connected with the order. Such book shall be kept well locked and with due care by the secretary and delivered to his successor in office, he taking a receipt therefor.

"§ 4. Should any member fail or neglect to make such declaration, as provided in section 3 of this article, the legal amount shall be collected after his decease and placed to the widow and orphan reserve fund."

David Leventrill for appellant. Even if Isaac Lowenstein was not privileged to make a declaration in the form and to the

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effect which he did execute, the defendant, by accepting it and thereafter continuing to receive payments from him, waived all objections to the declaration, and was bound to submit to its terms, and to pursue its direction as to the payment of the fund to "the heirs." (*Erdman v. Mut. Ins. Co.*, 44 Wis. 376; *Roswell v. Eq. Aid Union* [N. D. N. Y.], 13 Fed. Rep. 840.) Isaac Lowenstein, having executed a will by which he made disposition of the fund in the event of the nullity of the declaration, did all that should or could have been done to reserve the endowment to a person of his selection. (*Supreme Council v. Priest*, 46 Mich. 429; *Richmond v. Johnson*, 10 N. W. Rep. 596; *Expressmen's Aid Society v. Fenn*, 9 Mo. App. 412; *Masonic, etc., v. McAuley*, Am. L. Reg. 141.) With reference to society insurance, courts have invariably "strained a point" to avert a forfeiture. (*Supreme Lodge v. Abbott*, 82 Ind. 1; *Georgia Masonic M. L. I. Co. v. Gibson*, 52 Ga. 640; *Excelsior In. A. A. v. Riddle*, 16 Cent. L. J. 407; *Illinois Masonic, etc., v. Baldwin*, 86 Ill. 402.)

Adolph L. Sanger for respondent. The designation or declaration made by Isaac Lowenstein to his lodge in October, 1873, became ineffectual because of the subsequent death of his mother, and the failure of the deceased to comply with defendant's by-laws by not designating some other person as his beneficiary. (By-laws, art. 10; *Arthur v. Odd Fellows' Association*, 29 Ohio St. 557; *Ind. Mut. B. Soc. v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52; 4 Kent's Com. 327, 334; *Duvall v. Goodson*, 22 Alb. L. J. 479; *Kentucky Masonic Ins. Co. v. Miller's Adm'r*, 13 Bush, 494; *Richmond v. Johnson*, 28 Minn. 447; *Durian v. Central Verein*, 7 Daly, 168.) The will of Isaac Lowenstein was not in any way a compliance with the by-law of the district. (*Duvall v. Goodson*, 22 Alb. L. J. 479.) The fund provided is a benefit and not insurance. (*Gundloch v. Germ. Ins. Co.*, 4 Hun, 339, 341; *Ballou v. Giles*, 3 Wis. 273; *Durian v. Central Verein*, 7 Daly, 168; *M. M. B. Co. v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52; *Arthur v. Odd Fellows' Ben. Association*, 29 Ohio St. 557;

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Greeno v. Greeno, 23 Hun, 478, 482; *Kentucky M. M. L. I. Co. v. Miller*, 13 Bush, 489.) When the deceased signed his declaration in the lodge book, he adopted the provisions of the law governing the payment of this benefit, and it became binding upon him as a contract between him and the district. (*Gundloch v. Germania Association*, 4 Hun, 341; *Gooch v. Association of Aged Females*, 109 Mass. 558, 567; *McCabe v. Father M. Soc.*, 24 Hun, 149, 152; *Ind. Mut. Soc. v. Clendinen*, 44 Md. 432; *Lassenscheidt v. Fresco Painters*, 1 City Ct. R. 8; *St. Patrick's B. Soc. v. Mo Vay*, 92 Penn. St. 510.)

FINCH, J. The charter and by-laws of the defendant corporation constituted the terms of an executory contract to which the testator assented when he accepted admission into the order. The testator agreed on his part to pay certain dues and assessments as specified, and the corporation agreed upon the death of the testator to pay \$1,000 to his wife, if living; if dead, to his children; and if there should be neither wife nor children, then to "such person or persons as he may have formally designated to his lodge prior to his decease;" such sum to be collected for that purpose by assessments. The corporation contracted to pay to no one else, and were not bound to pay at all except "to the person or persons" described in the agreement, and out of such collected assessments. Lowenstein, the plaintiff's testator, did so designate to his lodge, prior to his decease, his mother, Rika Lowenstein. He had neither wife nor children, and so was at liberty to select and name the beneficiary. The designation which he thus made describes the payment directed as "the \$1,000 my heirs are to receive" of the corporation. This language was purely matter of description, intended to identify the fund, and will not at all bear the interpretation sought to be put upon it of a designation of his "heirs" as the recipients. On the contrary, the paper itself excluded any such interpretation, for its very purpose was to name and designate the particular recipient irrespective of the question whether she should prove to be one of his heirs or not. If his mother had been living at his death she would

have been entitled to the endowment, because specifically named, and not by virtue of any relationship to the testator. The mother thus named had no interest in or title to the money to be paid while she was living. The testator could have at any time gone to his lodge and designated upon the books some other recipient, thus revoking his previous designation. The mother could not become entitled to the endowment at all unless she survived the testator, and her designation remained unrevoked. Nor did the testator have any interest in the future fund. He had simply a power of appointment, authority to designate the ultimate beneficiary, and that power and authority died with him, because it could only be exercised by him, and prior to his decease. If he did not so exercise it, nobody surviving or representing him could, and upon his death he could have nothing which would descend, or upon which a will could operate. His contract effected that result. He agreed that the endowment to be collected should be paid, not to his next of kin, not to the legatee named in his will, but to the person designated to his lodge, or in default of such person so named, then to nobody.

But the mother, Rika Lowenstein, died before the testator. The endowment could not be paid to her, and was payable to no one else. Her death made the designation inoperative, and the case stood exactly as if no designation had been made. It was competent for the testator to name another recipient. The learned counsel for the appellant argues that he was not obliged to do so. That is true, and is not in the least doubtful, but the consequence of a failure to name and designate a beneficiary to whom payment could be made was inevitably that the corporation would not be bound to pay at all, and might either omit to collect the money, or put it when collected into its treasury. At a later period a "reserve fund" was constituted by the order to meet such omissions. Just that emergency happened. Lowenstein never designated to his lodge anybody living at his death to whom the money could be or was payable. But he made a will and assumed to dispose of this promise of payment in that way. But the promise was

not to pay to him, and became no promise at all if the condition which alone could give it vitality remained unperformed. It is said, however, that the will operated as a new designation. That cannot be because it was in no manner brought to the notice of the lodge. Had it been, in his lifetime, it would have been good as a designation although not yet operative as a will. "Shall formally designate to his lodge," is the agreement he made, and that is not fulfilled by a designation not known to the lodge, and kept a secret to himself. But it is said the will was presented to the lodge, and so they had notice. That also is true, but it was after his death, and the condition of payment to which he agreed was that the designation should be made "prior to his decease."

We have thus far reasoned about the case upon the charter and by-laws as they stood when the decedent entered the order; that is, at the moment when he made his contract; because we understand the appellant to deny that the agreement could be changed by subsequent amendments. But if the later rules apply they only make the case plainer. The by-laws in force between 1874 and 1880 provided that the designation should be made in the "lodge book" and "witnessed by a brother." The endowment went first to the wife, or wife and children together, second to the children, third to the father and fourth to the mother, and no other person could be entitled unless properly designated to the lodge. If none of these persons existed and no such designation was made it was provided that the money should be paid in "to the widow and orphan reserve fund." Our attention was called to the fact that the case did not show that the decedent left no father. Granting the fact, it is not the father or any one representing him who is before us, and if he survived the son, the money is payable to him or his representatives, and not to the present plaintiffs. We can discover no ground upon which they are entitled to succeed. We have examined all the authorities cited on both sides. Most of them will be found to harmonize with the views we have expressed. (*Md. Mut. Ben. Soc., etc. v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52; *Arthur v. Odd Fellows'*

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Ben. Ass'n, 29 Ohio St. 557; *Ken. Masonic Mut. L. Ins. Co. v. Miller's Adm'r*, 13 Bush, 489; *Richmond v. Johnson*, 28 Minn. 447; *Durian v. Central Verein, etc.*, 7 Daly, 168; *Greeno v. Greeno*, 23 Hun, 478.) Those seemingly not in harmony, will be found to rest upon charter provisions, materially and substantially different from those before us (*Catholic Mut. Ben. Ass'n v. Priest*, 46 Mich. 429; *Expressmen's Aid Soc. v. Lewis*, 9 Mo. App. 412), or to relate merely to questions of waiver which are of no importance to the present case. (*Erdmann v. Mut. Ins. Co., etc.*, 44 Wis. 376; *Roswell v. Eq. Aid Union*, 13 Fed. Rep. 840.)

The claim that a further designation after the death of his mother was excused by the testator's insanity for a portion of the interval preceding his death, is not well founded. A designation was the condition precedent of defendant's liability. The death of Lowenstein without fulfilling it, however sudden or unexpected, in no manner excused its prior necessity, nor could his insanity.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

THE PEOPLE, ex rel. EDWARD NEWCOMB, as Receiver, etc.,
Respondent, v. JOHN A. McCALL, as Superintendent, etc.,
Appellant.

The provision of the act of 1883 "in relation to the receivers of corporations" (§ 2, chap. 378, Laws of 1883), which fixes the compensation of such receivers, is prospective in its operation, and does not apply to receivers who had been appointed and had entered upon the discharge of their duties before the passage of the act.

Accordingly *held*, that a receiver of a life insurance company, appointed under the act of 1869 (Chap. 902, Laws of 1869), and who entered upon the performance of his duties prior to 1883, was entitled to have his compensation fixed by the superintendent of the insurance department, as provided by said act (§ 18); and that he was entitled to a *mandamus* to compel the superintendent to so fix his commissions.

(Argued January 29, 1884; decided February 5, 1884.)

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Statement of case.

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 29, 1883, which affirmed an order of Special Term, commanding that a writ of peremptory *mandamus* issue, directed to John A. McCall, Jr., as superintendent of the insurance department of the State of New York, requiring him to fix the compensation of Edward Newcomb, as receiver of the Atlantic Mutual Life Insurance Company.

The facts are sufficiently stated in the opinion.

D. O'Brien, attorney-general, for appellant. A statute ought to receive such construction as will best answer the intention of the makers. The title of an act of the legislature in this State is proper to be considered as bearing upon the meaning and purpose of the act. (*People, ex rel. Cook, v. Wood*, 71 N. Y. 371; *Tonnele v. Hall*, 4 id. 140; *People, ex rel. v. Supervisors*, 70 id. 236; *People v. Supervisors*, 43 id. 132; *People, ex rel. v. Clute*, 50 id. 457; *Assembly Document*, 1882, No. 121, p. 10; *Senate Document*, 1883, No. 38.) The act of 1883 (Chap. 378) may apply, without objection, to pending cases, and to all cases where the fees had not become the property of the receiver at the time of its passage; such is the present case. (*Attorney-General v. N. A.*, 89 N. Y. 103; 80 id. 95; *McClellan's Surr. Pr.* 617, 618; *Wheelwright v. Wheelwright*, 2 Redf. 501, 503; *Wheelwright v. Rhoades*, 28 Hun, 59, 60; *Bank v. Wiloughby*, 1 Sandf. S. C. 169; *Porter v. Cobb*, 25 Hun, 185; *Supervisors v. Briggs*, 3 Denio, 173; *McMaster v. Vernon*, 4 Duer, 626; *Rich v. Husson*, 1 id. 618, 619; *Salter v. R. R. Co.*, 86 N. Y. 401; *Bank v. Bank*, 89 id. 412; *Morse v. Gould*, 1 Kern. 282; *Connor v. Mayor*, 2 Sandf. S. C. 355; 5 N. Y. 285; *Phillips v. Mayor, etc.*, 4 Hilt. 183; *Peoples v. Burroughs*, 27 Barb. 89; *People v. Roper*, 35 N. Y. 629; *Butler v. Palmer*, 1 Hill, 224; *Cooley on Const. Lim.* 284; *In re Election of Trustees*, 23 Hun, 615; *Penniman's Case*, 103 U. S. 714; *Morse v. Gould*, 11 N. Y. 281.) The objection that the act of 1869 was a special act, and was not affected by the passage of a general

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law, is not tenable. (*Smith v. People*, 47 N. Y. 330; *Matter of Trustees*, 28 Hun, 615.)

Nathaniel C. Moak for respondent. Under the general rules of construction, the act of 1883 (Chap. 378) should not be so construed as to have a retrospective effect. (*Matter of Security Life*, 18 Weekly Dig. 154; *Bank of Niagara*, 6 Paige, 217; Code, § 3331; *Woodruff v. Imperial, etc.*, 90 N. Y. 521; *Kerrigan v. Force*, 68 id. 381, 384.) This receiver having been appointed under a special statute as to a particular class of insurance companies, in which his fees are provided for, a general statute does not affect him. (*McKenna v. Edmondstone*, 91 N. Y. 231; *In re Del. & Hudson C. Co.*, 69 id. 209; *In re Comm'rs*, 50 id. 497; *People v. Quig*, 59 id. 88.)

EARL, J. The relator was appointed receiver of the Atlantic Mutual Life Insurance Company, in July, 1877, under and in pursuance of chapter 902 of the Laws of 1869. The thirteenth section of that act provides that "the compensation of the receiver under this act shall be fixed by the superintendent of the insurance department, and shall not exceed the sum of five per cent on the amount of the assets of such company, as shall come into his possession." On the 11th day of April, 1883, the legislature passed an act, entitled "An act in relation to receivers of corporations," the second section of which provides as follows: "Every receiver shall be allowed to receive, as compensation for his services as such receiver, five per cent for the first \$100,000 actually received and paid out, and two and one-half per cent on all sums received and paid out in excess of the said \$100,000." The relator claims that he is entitled to have his compensation as receiver fixed by the superintendent under the first act mentioned; and the superintendent claims that the section cited from the last act controls, and that his compensation is to be determined under that act.

We are of opinion that the last act, so far as it fixes the compensation of receivers, is prospective in its operation, and that

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it was not intended to apply to receivers who had been appointed and had entered upon the discharge of their duties before its date. It is a general rule, often reiterated and laid down in reported decisions, that laws should be so construed as to be prospective and not retrospective in their operations, unless they are specially made applicable to past transactions, and to such as are still pending.

Receivers are supposed to earn the compensation provided for them by law, and their commissions are for services rendered, and it is not to be presumed, in the absence of a clear intention expressed in the statute, that the legislature meant to interfere with compensation that had already been earned. All the provisions of the law of 1883 are prospective. The first and third sections flanking section 2 expressly relate to receivers thereafter to be appointed. All the other sections of the statute subsequent to the third apply to future proceedings for conducting and winding up the affairs of the insolvent corporations named. To apply the new rule so as to regulate the compensation of receivers for services already rendered might work injustice; and while the legislative intention is not free from doubt, we are less unwilling to hold that the new rule is prospective in its operation because no injustice whatever can be done by such a construction, as it leaves the compensation of such receivers to be determined by the superintendent of the insurance department, who is supposed to be familiar with the services rendered, and entirely competent to determine the compensation to be allowed.

For these reasons, without further elaboration, we are satisfied that the compensation of the receiver in this case should be fixed under the statute of 1869.

The order should be affirmed, with costs.

All concur.

Order affirmed.

Statement of case.

JOHN J. BERGEN, as Treasurer, Appellant, v. JOHN K. POWELL,
Respondent.

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The provision of the State Constitution (Art. 10, § 3), declaring that where the duration of an office is not provided by the Constitution or declared by law "such office shall be held during the pleasure of the authority making the appointment," applies only when the power is continuous. Where appointments had been made under the act of 1878 (Chap. 305, Laws of 1878), making provision for a police commission in the town of New Lots, which provides for the appointment of three commissioners within thirty days after the passage of the act by certain town officers specified, among others "the justices of the peace * * * now in office having the shortest term to serve," and that in case of a vacancy in said office the successor shall be appointed by the supervisor of the town, *held* that the power of original appointment was conferred only upon those who at the time specified held the offices named, not upon those who might thereafter be incumbents; also that the power embraced but a single act and was exhausted with its performance; and that those holding the offices named had no authority to remove the persons so appointed.

(Argued January 29, 1884; decided February 5, 1884.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made September 10, 1883, which affirmed a motion on the part of the relator, John J. Bergen, as treasurer of the police board of the town of New Lots, denying a motion for an order compelling defendant to deliver up to the relator the books and papers belonging to the office of said treasurer. (Reported below, 30 Hun, 438.)

The material facts are stated in the opinion.

A. Simis, Jr., for appellant. The same offices (not the individuals) that appointed constitute the power to remove. (*People, ex rel. Lyndes, v. Comptroller, etc.*, 20 Wend. 595.) Where the tenure of an office is not fixed by the Constitution or statute, and no provision for removal exists in either, then the appointees hold at the will of the appointing power. (*State v. B'd of Public Lands*, 7 Neb. 42; *People v. Hill*, 7 Cal. 97; *Keenen v. Perry*, 24 Tex. 253; *Williams v. Boughue*, 6

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Cald. [Tenn.] 486.) A vacancy exists when an office is without an incumbent, no person entitled to exercise its powers. (*State v. Brecker*, 56 Mo. 17; *State v. Irwin*, 5 Nev. 11.)

Wm. J. Gaynor for respondent. The act of 1878 (Chap. 305) conferred on the supervisor, excise commissioner and justices only a temporary authority, a power for a particular occasion. (Constn., art. 10, § 3; *People, ex rel. v. Woodruff*, 32 N. Y. 355, 361-363.)

DANFORTH, J. By the act of May 22, 1878 (Sess. Laws of 1878, chap. 305), provision was made for a police commission in the town of New Lots, Kings county, consisting of three persons, to be appointed within thirty days after the passage of the act, by the supervisor, the president of the excise commission, and, as the act reads, "the justices of the peace of said town," in office at the time of the passage of the act, "having the shortest term to serve, or a majority of them, and in case of a vacancy in said office of police commissioner or commissioners, occurring by reason of death or otherwise, it is enacted that the successor or successors of such commissioner or commissioners should be appointed by the supervisor of said town." The board is directed to select annually from any of its members, a treasurer. Under this act Messrs. Suter, Powell and Wyckoff were made commissioners, and by them Powell was appointed treasurer. They were in office up to, and on the 17th of February, 1883, when, as the relator claims, Suter and Powell were removed from office by the supervisor of the town and the justice of the peace then in office, having the shortest term to serve, and Mr. Kiendl and the relator Bergen appointed in their places. These two persons selected the relator as treasurer, and he demanded of Powell the books and papers belonging to that office. He was denied, and, therefore, instituted this proceeding to compel their delivery.

The persons assuming to exercise the power of removal did not possess it. It is not given to them by the statute. So much is conceded by the relator. His contention is that it

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comes under the operation of section 3, article 10 of the Constitution, which in cases not there provided for, or declared by law, limits the duration of office "to the pleasure of the authority making the appointment." But this applies only where the authority is continuous. The power delegated by the act before us was to be exercised within thirty days after its passage, and in part by a justice of the peace then in office. As to duration of authority and the agent entrusted with it, these are words of limitation and can apply only to the person who at the time specified answered that description, and not to one who at some future time might be an incumbent of the office of justice of the peace. Moreover, a single object was in view, and its accomplishment entrusted to them — the selection of persons who should constitute the board created by the statute. It seems apparent, therefore, that the authority embraced a single act only, and was exhausted with its performance. Nor was any thing more needed. The statute (§ 2) secured the permanence of the board so created, by imposing on the supervisor alone the duty of filling by appointment any vacancy in the office of commissioner, however caused, and if the construction asked for by the relator should be adopted it would follow that the members of the board originally appointed, could be removed by persons filling for the time being the offices of supervisor, president of the excise commission and justice of the peace, but all subsequent appointees by the supervisor alone. The different members of the board would, therefore, hold office at the will of divers parties, a condition of things not likely to produce harmony in the administration of its duties, and not to be encouraged in the absence of legislative language making such result necessary. As there was no vacancy, the appointment of the relator and Kiendl to the office of commissioner, was invalid, and the respondent properly retained possession of the books and papers in question.

The order appealed from should therefore be affirmed.

All concur.

Order affirmed

Statement of case.

AGNES G. HUMPHREY, Respondent, v. MARY E. HAYES et al.,
Appellants.

As the act of 1879 (Chap. 542, Laws of 1879), amending the provisions of the Code of Civil Procedure (§ 549) in reference to arrest, by authorizing an arrest in an action on contract where fraud is alleged in the complaint, and declaring that where such an allegation is made, plaintiff cannot recover without proving fraud, by its terms (§ 2), does not apply to actions theretofore commenced, it is not essential in such an action where the defendant has been arrested on affidavits charging fraud, to amend the complaint by inserting therein allegations of fraud, nor is it necessary to prove the fraud on the trial.

In an action upon a guaranty of payment in an assignment of a bond and mortgage for \$1,250 it appeared that at the time of the assignment there was another mortgage upon the premises, bearing the same date and recorded at the same time as the assigned mortgage. The holder of the other mortgage obtained a decree of foreclosure thereon, which plaintiff purchased for the sum of \$669.65; the mortgaged premises were sold under the decree to plaintiff for \$100. The defendants were not parties to the foreclosure and it did not appear that they had any knowledge of the foreclosure or the sale. The value of the premises at the date of the assignment was \$3,000, and at the time of sale \$1,500. *Held*, that as the acts of plaintiff were injurious to the rights of the guarantors they were thereby discharged, either wholly or to the extent to which the security was impaired, *i. e.*, the proportionate part of the value of the mortgaged premises at the time of sale, applicable upon the guaranteed mortgage.

It seems that the assignee in such a case is not bound to exercise diligence, and until required by the guarantor to enforce his bond and mortgage, delay in so doing, and a consequent impairment of the security, is no defense. He is not at liberty, however, to do any affirmative act impairing the security; the guarantor on payment is entitled to enforce the mortgage for his own indemnity, and any act of the assignee which operates to deprive him of that indemnity discharges him.

The assignment also contained a covenant that the assigned mortgage was the first lien upon the mortgaged premises. *Held*, that proof of knowledge on the part of the assignors of the existence of the other mortgage was not sufficient to sustain a finding of fraud.

After trial of the action and the decision of the court, but before judgment, an order of arrest was issued and served; it was granted on affidavits establishing fraud *prima facie*. *Held*, that the order was in time; and that although the averments in said affidavits were denied by defendant's opposing affidavits, the questions of fact were for the court below to pass upon, and its determination was not reviewable here.

(Submitted December 11, 1883; decided February 8, 1884.)

Statement of case.

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made the third Monday of September, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial, without a jury. Also, appeals from two orders of said General Term, made at the same term, which denied motions on the part of defendants to vacate an order of arrest herein.

This action was commenced in 1878, upon a guaranty of payment contained in an assignment of a bond and mortgage.

The action was tried in October, 1880; the court rendered a decision in February, 1881; after this, but before judgment was entered thereon, an order of arrest was granted against defendant Edwin L. Hayes, and he was arrested thereunder and admitted to bail.

The further material facts appear in the opinion.

Nelson Cross for appellants. If fraud could be predicated upon the covenant in the assignment to plaintiff, the fraud must be proved; it could not be presumed. (*Wakeman v. Dalley*, 51 N. Y. 31; *Marsh v. Falker*, 40 id. 565; *Graves v. Waite*, 59 id. 158; *Still v. Little*, 63 id. 427.) As this mortgage was dated and recorded at the same time as the other, the defendants, even if they had known of the fact that the other remained unpaid or unsatisfied, may have honestly supposed that it was first as it was not secondary to any other. (*Oberlander v. Casper*, 45 N. Y. 175; *Still v. Little*, 63 id. 427; *Wakeman v. Dalley*, 51 id. 27.) An amendment changing an action from contract to tort will not be allowed. (*De-graw v. Elmore*, 50 N. Y. 1, 4, 5; *Ross v. Mather*, 51 id. 108; *Barnes v. Quigley*, 59 id. 265; *Walter v. Bennett*, 16 id. 250; *Joslyn v. Joslyn*, 9 Hun, 388; Wait's Pr., §§ 721, 722, 723; *Small v. Smith*, 1 Denio, 583; *Story v. Brennen*, 15 N. Y. 526; *Algur v. Easton*, 54 id. 360; *Gale v. Wells*, 12 Barb. 84.) The same circumstances which in equity would discharge a surety, may be pleaded as a defense in an action on a contract in a court of law. (*Lailly v. Elmore*, 2 Paige, 497; *Boys v. McDonough*, 39 How. 389; *Boyd v. Finnegan*, 3

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Daly, 222.) Gross negligence in securing the debt may relieve the surety. (*Duval v. Trash*, 12 Mass. 154; *Goring v. Edmonds*, 6 Bing. 94; *McKecknis v. Ward*, 58 N. Y. 541.) Any act of the principal interfering with the right of subrogation will release the surety. (*Boyd v. McDonough*, 39 How. 389; *Hayes v. Ward*, 4 Johns. Ch. 130; *Cary v. Leonard*, 56 N. Y. 494; *Billington v. Wagner*, 33 id. 31; *Boyd v. Finnegan*, 3 Daly, 222; *Lewis v. Palmer*, 28 N. Y. 271.) Amendments, when properly made, do not admit of altering the issue between the parties, they cannot change fraud into contract and *vice versa*. (*Barnes v. Quigley*, 59 N. Y. 265; *Lane v. Beanes*, 19 Barb. 51.) An amendment alleging tort is not allowed, because it would subject defendant to execution against the person. (*Cushman v. Jewell*, 7 Hun, 526.) Where a defendant has been guilty of fraud in contracting or incurring a liability, it must be so alleged in the complaint, and if not so alleged an order of arrest must be vacated. (*Hect v. Levy*, 20 Hun, 53; Code of Civ. Proc., §§ 549, 550, 580.) An order of arrest cannot be granted after final judgment. (Code of 1870, § 245; *Bank v. Hutchkiss*, 5 How. Pr. 480.)

Tunis G. Bergen for respondent. The court never presumes any thing against a judgment, but if compelled by imperfections in the statement of facts to resort to presumptions, will adopt such only as will sustain the judgment. (*Carman v. Pultz*, 21 N. Y. 547; *Schoonmaker v. Spencer*, 54 id. 366; *Willis v. Weaver*, 58 id. 681.) Even if the court had not allowed the amendments, the right to amend exists and can be done even after judgment, and the court never reverses a judgment, although the amendment has not been made, when it conforms to the proofs. (*Bennett v. Judson*, 21 N. Y. 240; *Lownsbury v. Purdy*, 18 id. 515; *Tisdale v. Morgan*, 7 Hun, 583.) As the contract here made by the wife related to her separate estate, her liability is complete. (*White v. Mo Nett*, 33 N. Y. 374; *Cashman v. Henry*, 75 id. 113; *M. B. & M. Co. v. Thompson*, 58 id. 80, 83.) As to the defendant, Mary E. Hayes, since the consideration of \$1,100 moved directly be-

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tween her and the plaintiff, the guaranty of payment constitutes an original covenant under seal, and is not a technical guaranty in law. The same rules therefore apply which prevail with reference to the consideration of any other original contract. (*Leonard v. Vredenburg*, 8 Johns. 39; 24 Wend. 456; 1 Bouvier Dict. 402, 403, 404, 444, 563; 4 Cow. 432; 2 Denio, 45.) In a guaranty of payment the guarantor undertakes unconditionally that the debtor will pay, and the creditor, upon default, may proceed directly against the guarantor without taking any steps to collect of the principal debtor. (*McMurray v. Noyes*, 72 N. Y. 525.) The declaration that the mortgage sold to the plaintiff was the first lien was, although false and fraudulent, such a representation and covenant as would remove from the plaintiff every obligation to investigate whether there was another mortgage or not. (*Mead v. Bunn*, 32 N. Y. 275; Bigelow on Fraud, 67, 68, 69, 305; *Brown v. Tuttle*, 66 Barb. 175; *Bennett v. Judson*, 21 N. Y. 248.) The amendment alleging fraud does not change the nature of the action from one *ex contractu* to one in tort. The action is not thereby made *ex delicto*. (*Ledwich v. McKinn*, 53 N. Y. 307; *Newstall v. Adams*, 5 Duer, 43; *Smith v. Mackin*, 4 Lans. 41; *Woolsey v. Trustees*, 2 Keyes, 605.) The defense of the statute of limitations is worthless. (Code, § 381; *Peters v. Delaplaine*, 49 N. Y. 371; *Bommer v. Am. L. Co.*, 44 N. Y. Sup. Ct. 454.) The appellants having availed themselves of the privilege given by the order denying the first motion to vacate by making a new motion cannot appeal from that order. (1 Bliss Ann. Code, 907, note *c. e.*; *Robbins v. Ferris*, 5 Hun, 286.) Where affidavits of arrest state positively matters not denied, etc., courts of review take them as stated. (*Pearson v. Freeman*, 77 N. Y. 589; *Barrett v. Selling*, 5 Weekly Dig. 190; *Meyer v. Belden*, 8 id. 344.) At the time this action was begun the original complaint was a proper one to sustain an order of arrest. (*Nat. Bowery B'k v. Duryee*, 74 N. Y. 491; Laws of 1879, chap. 542, § 2, p. 619; *Hecht v. Levy*, 9 Weekly Dig. 313.) Applications to set aside a judgment for matters *in pais de hors* the record are addressed

to the discretion of the court of original jurisdiction. (*Williams v. Montgomery*, 60 N. Y. 648.) Where a fact may be clearly inferred from allegations sustaining an order of arrest, such fact may be regarded as averred. (*Meyer v. Belden*, 8 Weekly Dig. 344; *Mead v. Bunn*, 32 N. Y. 275; Bigelow on Fraud, 67, 68, 69, 305, 470; *Brown v. Tuttle*, 66 Barb. 175; *Bennett v. Judson*, 21 N. Y. 241; *Cunningham v. Freeborn*, 3 Paige, 557; *Dykens v. Woodward*, 7 How. 314; *Churchill v. Bennett*, 8 id. 311; Note in Kerr on Fraud, 389, 385, 384; *Watt v. Grove*, 2 S. & L. 502.) The time for charging in execution is to be computed from the date of actual entry of judgment, not from the time when it might have been entered. (*Mott v. Union B'k*, 38 N. Y. 19; *Hathaway v. Howell*, 54 id. 97; *Lippman v. Peterson*, 9 Abb. 209; 18 How. 279; *Standacher v. Pregonzer*, 52 id. 76; 30 N. Y. 581.) Where a fact may be clearly averred from allegations sustaining an order of arrest, such fact may be regarded as averred. (*Bennett v. Judson*, 21 N. Y. 240; *Lounsbury v. Purdy*, 18 id. 515; *Meyer v. Belden*, 8 Weekly Dig. 344.) An allegation of fraud in action on contract does not change the nature of the action, and the action is not thereby made *ex delicto*. (*Ledwick v. McKim*, 53 N. Y. 307; 5 Duer, 43; 2 Keyes, 605.)

RAPALLO, J. It was not necessary for the purpose of sustaining either the judgment or the order of arrest, that it should have been averred in the complaint or proved upon the trial that the defendants had been guilty of fraud in contracting the liability sued upon. The requirements of subdivision 4 of section 549 of the Code of Civil Procedure were introduced, by amendment, by chapter 542 of the Laws of 1879, and section 2 of that act expressly provides that the amendments to sections 549 and 550 shall not apply to actions theretofore commenced.

This action was commenced prior to the adoption of those amendments. It is immaterial, therefore, that the complaint was not duly amended so as to contain proper allegations showing fraud, or that the facts admitted on the trial and stated in the findings were insufficient to establish fraud.

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We think, however, that the judgment was erroneous in another respect. The action was brought upon a guaranty by both defendants of payment of a bond and mortgage on real estate in New Jersey for \$1,250 belonging to the defendant Mary E. Hayes, wife of defendant E. L. Hayes, and assigned by both defendants to the plaintiff, in consideration of \$1,100, paid in February, 1872, to the defendant Mary E. Hayes. The court rendered judgment on said guaranty in favor of the plaintiff against the defendants April 4, 1881, for the whole of said sum of \$1,100, with interest to that date, from February 1, 1872, amounting in all to \$1,785.75, besides costs. The mortgage had never been foreclosed, but the following facts were set up in defense and found by the court.

The mortgaged premises were, at the time of the assignment of the mortgage to the plaintiff, subject to another mortgage for a smaller amount, bearing the same date and recorded at the same time as the mortgage in question in this action, and consequently being a concurrent lien upon the mortgaged premises. This smaller mortgage had formerly been held by the defendant Mary E. Hayes and had been assigned by her to Charles R. Abbott. In April, 1876, Abbott obtained a decree of foreclosure of that smaller mortgage, and in August, 1876, the plaintiff purchased that decree for the sum of \$669.65, and afterward, on the 16th of August, 1876, the mortgaged premises were sold under that decree, to the plaintiff, for \$100, and she received the sheriff's deed therefor. It is further found that the value of the mortgaged premises at the date of the assignment and guaranty in suit, was at least \$3,000, and so continued until the years 1876 or 1877, and that their value at the time of the trial was \$1,500.

Neither of the defendants was a party to the foreclosure of Abbott, and it is found as a fact that it does not appear that either of them had any knowledge of such foreclosure thereof, or of the sale.

The defendants set up in their answer in this action that with ordinary diligence the plaintiff could have collected the bond and mortgage guaranteed by them. That when it be-

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came due and for a long time thereafter it was amply secured, but that through plaintiff's neglect the security had been greatly impaired.

This defense was not sustainable, it not appearing that the plaintiff had been called upon to enforce the lien of the mortgage. The guaranty being of payment and not of collection, she was not bound to take proceedings to foreclose unless required so to do by the guarantors.

But, nevertheless, she was not at liberty to do any affirmative act which should impair the security and deprive the guarantors of any benefit which they might derive therefrom on payment of their guaranty. On making such payment they were entitled to enforce the mortgage for their own indemnity, and any act of the plaintiff which operated to deprive them of that indemnity discharged them. If the plaintiff extended the time of payment, or released the premises from the lien of the mortgage, or did any similar act injurious to the rights of the guarantors, she thereby discharged them, either wholly or to the extent to which the security was impaired.

We think that her acts, as shown by the findings, were of that character. The two mortgages having been made at the same time, and simultaneously recorded, were concurrent liens upon the mortgaged premises, and on a sale thereof the proceeds were distributable *pro rata* on both mortgages. Such, also, is the law of the State of New Jersey, as appears from the decree of foreclosure rendered by the Court of Chancery, and which appears in the case, under which the plaintiff bought in the property, and which directed the proceeds of sale to be thus apportioned. Neither of the mortgages was entitled to the whole proceeds, if the premises brought enough to pay but one of them, nor to be paid in full unless the proceeds were sufficient to pay both. If the plaintiff had not bought the Abbott mortgage and decree and he had proceeded to a sale and the premises had brought only a sum equal to the amount due him on his mortgage, that sum should have been apportioned and the greater part of it would have gone to reduce the plaintiff's mortgage. If she had consented that Abbott

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take the whole proceeds, that consent would have prejudiced the defendants and could have been set up by them as a defense. She was not at liberty to waive any right they would have had in the proceeds had they taken up the mortgage guaranteed. (*Lewis v. Palmer*, 28 N. Y. 271; *Cory v. Leonard*, 56 id. 494.) But by purchasing the decree in the Abbott case, and herself causing the property to be sold, and bidding it in for a nominal amount, in a proceeding to which the defendants were not parties and of which, as the trial judge finds, it does not appear that they had any notice, leaving nothing to be credited on the guaranteed mortgage, she did a still more decided act to the prejudice of the defendants than if she had merely suffered Abbott to take the whole proceeds. She absolutely extinguished the guaranteed mortgage. She was under no obligation to purchase the Abbott decree. It was not necessary for her protection, not being a prior but a concurrent lien. She would have had the same rights in the proceeds of sale if the sale had been made by him, as if made by herself, and by her purchase from him she acquired no greater rights than he would have had if he had continued to hold the decree. The mortgaged premises were certainly worth something. Her payment to him of the full amount of the decree shows that it must have been assumed that they would bring enough to pay both mortgages, for he was entitled only to a *pro rata* share.

It is admitted and found, that the premises were worth at least \$3,000 up to the year 1876 or 1877, when the railroad depot was removed. That date does not appear, nor does the case show whether it was before or after the sale, which took place August 16, 1876. But supposing it was before, the subsequent value is conceded to be \$1,500. By the course the plaintiff took she obtained the whole property under the Abbott decree, discharged of the guaranteed mortgage, and now recovers of the defendants the whole amount of the guaranty in addition, when in fact at least two-thirds of the value of the mortgaged premises, whatever it may have been, was applicable on the guaranteed mortgage. Such a dealing, as against sureties, is grossly inequitable and cannot be sustained.

The court below puts the case on the ground that the assignment of the Abbott decree to the plaintiff and her bidding in the property no more operated to discharge the guarantors than if she had foreclosed her own mortgage and thus exhausted her security. We think there is a great difference. She virtually appropriated the whole property to the reimbursement of what she had paid for the Abbott decree, when if Abbott had himself sold he would doubtless have bid it up to an amount sufficient to pay his own claim or so much thereof as the premises would pay, and the proceeds would have been apportioned between the two mortgages. It certainly cannot be supposed that he would have let the premises go for the \$100, which was the sum bid by the plaintiff. But she placed herself in a position which enabled her to buy in at that price and still incur no loss, even if the premises were insufficient to pay both mortgages, provided she could retain her entire claim against the guarantors of the larger mortgage, and she did this, apparently, without the knowledge of the guarantors. A party holding a guaranty is not at liberty thus to speculate upon the guarantors. If the plaintiff had foreclosed her mortgage the guarantors were entitled to notice of the sale and could have protected themselves to the extent of the value of the property. If a party holding a guaranty of payment of a mortgage should without notice to his guarantors secretly foreclose and sell the mortgaged premises and buy them in for a sum greatly below their value, it cannot be pretended that he could retain the property thus purchased, and recover the full amount guaranteed.

I have considered the case upon the original complaint, which is founded solely upon the breach of the contract of guaranty. The question of fraud is before us on the appeal from the order denying the motion to vacate the order of arrest granted against the defendant Edwin L. Hayes, but I do not think that it arises on the appeal from the judgment. In the first place, as the case stood when the action was brought, the allegation of fraud could not properly have been made in the complaint, which is upon contract, nor could it have been proved upon

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the trial or adjudicated upon, for, as before stated, the amendment of 1879 which authorizes that course does not apply to this action. An amendment of the complaint charging fraud could not have been regularly made upon the trial, for its effect would have been, either to change the cause of action from contract to tort, or to produce a misjoinder of causes of action. But assuming that such an amendment was made, or is to be considered as made, the further difficulty remains that no facts were shown upon the trial sufficient to sustain a finding of fraud. All that appeared on the trial was that the assignment containing the guaranty sued upon also contained a covenant that the assigned mortgage was the first lien upon the mortgaged premises. This assignment is dated February 1, 1872, and the admission of facts, which appear to constitute all the evidence introduced upon the trial, contains a statement that prior to the time of the execution of the assignment the defendant Mary E. Hayes was the owner of another mortgage on the same premises for a smaller amount, bearing the same date and the same date of record as the assigned mortgage, which smaller mortgage was assigned on the 8th of January, 1872, to Charles R. Abbott. This is all. And the finding is, that the clause in the assignment covenanting that the assigned mortgage was the first lien upon the premises, was false and fraudulent, and on this finding the conclusion of law is based that the defendants were guilty of fraud in contracting their indebtedness to the plaintiff. If this conclusion is sound then every breach of covenant of title or against incumbrances will sustain an action for fraud, if the covenantor knew of any incumbrance or defect in his title, without showing that he made any representation, or that there was any intent to defraud, or that the covenantee was ignorant of the facts, or relied upon the representation. It needs no argument to prove that the facts stated are insufficient to sustain the conclusion, and there is a still further defect in that there is absolutely nothing in the evidence on the trial to show that the defendant Edwin L. Hayes knew of the mortgage held by Abbott or that the plaintiff

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iff was ignorant of it. It cannot be contended, therefore, that the judgment can be sustained on the ground of fraud.

We are of opinion that the acts of the plaintiff, in purchasing the Abbott decree, selling the premises thereunder and purchasing them for a nominal sum at the sale controlled by herself, and apparently without notice to the defendants, were prejudicial to them and in fraud of their rights to have a *pro rata* proportion of the proceeds of the mortgaged premises, at a fair sale thereof, applied on the mortgage they had guaranteed, and that such acts discharged them from their guaranty and from liability, in any form of action, to the extent at least of the proportionate part of the value of the mortgaged premises at the time of the sale, applicable on the guaranteed mortgage, and that on this ground the judgment should be reversed. The plaintiff extinguished the lien of the guaranteed mortgage as effectually as if she had taken a voluntary conveyance of the mortgaged premises, in which case the guarantors would have been discharged to the extent of the value of the premises. (*Loomer v. Wheelwright*, 3 Sandf. Ch. 135.) •

On the appeal from the order denying the motion to vacate the order of arrest, a different state of facts is presented. The affidavits on the part of the plaintiff state that the defendant Edwin L. Hayes, represented to the plaintiff that the assigned mortgage was the first lien upon the premises. That she relied upon this representation and was induced thereby to part with her money and take the assignment. That he knew of the Abbott mortgage and had previously represented to Abbott that it was the first lien, and that his representation to the plaintiff was made with intent to defraud her, she being ignorant of the actual facts. The affidavits are full and establish *prima facie* a case for an order of arrest, for fraud extrinsic the cause of action. The allegations are denied by affidavits on the part of the defendants, but the questions of fact thus presented, it was in the province of the court below to pass upon. The order of arrest was not applied for until after the trial and the decision of the court, but it was made and served before final judgment and therefore in time.

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The judgment should be reversed and a new trial ordered, costs to abide the event.

The appeals from the orders denying the motions to vacate the order of arrest should be dismissed with costs against the appellant Edwin L. Hayes.

All concur except RUGER, Ch. J., and EAEL and DANFORTH, JJ., who dissent.

Judgment reversed.

Appeals from orders dismissed.

In the Matter of the Distribution of the Surplus Money arising upon the Sale of the Real Estate of JOHN O. ZAHRT, deceased.

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The will of Z., after directing payment of debts, funeral expenses, etc., gave to his wife during her life "the rents, income, interest, use and occupancy" of all his estate, real and personal, upon condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep said estate in good repair. *Held*, that the provision was inconsistent with the assertion of a dower right, and so must be construed as in lieu of dower; and, the widow having accepted the provision so made, that she could not thereafter claim dower.

Lewis v. Smith (9 N. Y. 502), distinguished.

A widow who, by the will of her deceased husband, has a life estate in lands of which he died seized, in case of sale upon foreclosure of a mortgage thereon leaving a surplus, is not entitled, as of right, to a gross sum for the value of her life estate in the surplus to be estimated pursuant to rule 71 of the General Rules of Practice.

Except in the case of dower which is provided for by the Code of Civil Procedure (Subd. 3, § 2738), whether the widow shall have a gross sum in lieu of a life estate rests in the discretion of the court.

Said rule simply provides for the manner of estimating the gross sum when it is allowed.

(Argued January 16, 1884; decided February 8, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an

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order made September 11, 1883, which affirmed a decree of the surrogate of the county of Kings.

The nature of the decree and the material facts are stated in the opinion.

Geo. W. Roderick for appellant. The claim of dower is to be favored, and the presumption is that a provision in a will, not expressed to be in lien of dower, was intended as a bounty in addition. (*Sanford v. Jackson*, 10 Paige, 266; *Bull v. Church*, 2 Denio, 430; 5 Hill, 206; *Lewis v. Smith*, 9 N. Y. 502; *Fuller v. Yates*, 8 Paige, 325; *Leonard v. Steele*, 2 Barb. 20; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Wood v. Wood*, 5 Paige, 596; *Sullivan v. Mara*, 43 Barb. 523; *Birmingham v. Kirwin*, 2 S. & L. 452; *Webb v. Evans*, 1 Bin. 565; *McCullough v. Allen*, 3 Yates, 10.) This presumption can only be overcome where it appears from the will itself that it was clearly the intention of the testator that the widow should elect between the provisions in the will and her dower, and such intention must be manifested by the provisions of the will, being so repugnant to the claim of dower that they cannot stand together. (*Birmingham v. Kirwin*, 2 S. & L. 452; *Lewis v. Smith*, 9 N. Y. 502; 1 Roper on Husband and Wife, 582.) It is not sufficient to exclude the claim of dower that the testator, if he had contemplated the subject of dower, would probably have inserted a provision in his will declaring the disposition in favor of the widow to be in lien of dower; the court must be satisfied, from the will itself, that he contemplated the subject of dower and intended to exclude such claim. (*Dawson v. Bell*, 1 Kern. 761; *Yates v. Fuller*, 8 Paige, 330.) The doctrine of election is the same in all cases. The principle upon which it is founded is the same, whether applied in the case of a widow or of a devisee. (*Sanford v. Jackson*, 10 Paige, 270; *Leonard v. Steele*, 4 Barb. 20.) The use of the following language by the testator in his will, viz., "all my real and personal estate that I may be entitled at the time of my decease," should be construed in reference to real estate, as meaning all the interest in real estate of which he

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was possessed and of which he had the power of transferring, and this did not include the right of dower of his wife. (*Harrison v. Harrison*, 1 Keen, 768; *Dawson v. Bell*, id. 761; *Ellis v. Lewis*, 3 Hare, 310; *Ohurch v. Bull*, 2 Denio, 432; *Sandford v. Jackson*, 10 Paige, 266; *Lewis v. Luther*, 9 N. Y. 502, 511.) The fact that the devise is conditional does not change this rule of construction. (*Sandford v. Jackson*, 10 Paige, 266; *Bull v. Church*, 2 Denio, 432; *Dawson v. Bell*, 1 Keen, 761; *Harrison v. Harrison*, id. 765; *Webb v. Evans*, 1 Bin. 565.) The appellant is entitled to have the value of her life estate estimated pursuant to rule 71 of the General Rules of Practice, and the gross sum paid to her. (*Poff v. Kinney*, 1 Bradf. 1; Code of Civil Procedure, §§ 2, 17.)

H. C. Place for respondent. The affirmative acts of the petitioners constitute an acceptance of the provisions of the will in lieu of dower. (*Lewis v. Small*, 9 N. Y. 502-513; *Dodge v. Dodge*, 31 Barb. 413; *Sullivan v. Mara*, 43 id. 253; *Savage v. Bomham*, 7 N. Y. 561-575; *Tobias v. Ketchum*, 32 id. 319; *Vernon v. Vernon*, 53 id. 362; *Chamberlain v. Chamberlain*, 44 id. 441; 2 Banks' Rev. Stat. [6th ed.] 1122.)

EARL, J. This is an appeal taken by Eliza Zahrt, the widow of John C. Zahrt, deceased, from a decree of the Surrogate's Court of Kings county, made upon the distribution of surplus moneys, amounting to upwards of \$3,000, arising from a sale of certain real estate owned by the deceased at the time of his death, upon the foreclosure of a mortgage thereon. On the hearing before the surrogate, the appellant claimed dower in one-third of the surplus money, and asked to have the gross sum representing the value thereof, computed pursuant to section 2793 of the Code of Civil Procedure, paid to her; and she also claimed to have a life estate in the remaining two-thirds of such surplus money, after the payment of certain creditors of the estate, as devisee in the will of the deceased, and asked to have the gross sum representing the value

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of such life estate estimated pursuant to rule 71 of the General Rules of Practice. The surrogate held that the provision in her husband's will in her favor was in lieu of dower, and that she was put to her election, and that, having accepted the benefit of the provision, she relinquished her claim of dower. He further held that he had no power to estimate the value of the life estate in the surplus money, and directed that after the payment of certain debts of the deceased, the balance be paid to the county treasurer of Kings county, to be invested by him in the securities specified in section 2796 of the Code; that the income arising therefrom be paid to her during her life, and that upon her death the principal sum be paid to the respondents, the children of the deceased.

The will, after directing the payment of debts, funeral and testamentary expenses, contains the following provision: "I give, devise and bequeath to my wife, Eliza Zahrt, the rents, income, interest, use and occupancy of all my real and personal estate that I may die seized and possessed of, or to which I may be entitled at the time of my decease, upon the express condition, however, that she, my said wife, shall insure the buildings and personal property belonging to my said estate, and keep the same insured, and pay all taxes, water-taxes, and assessments that from time to time shall become a lien on my said estate, and keep said estate in good repair, to have and to hold the same to her, my said wife, for and during the term of her natural life; after the decease of her, my said wife, I give, devise and bequeath all my said real and personal estate to my children, to-wit: John Zahrt, Annie Zahrt, Frank Zahrt, Dora Zahrt, and to such child or children as shall hereafter be born to me by my said wife, share and share alike, to have and to hold the same to them, my said children, their heirs and assigns forever."

The important question to be determined in this case is whether the provision made for the appellant in the will of her husband was in lieu of dower so as to put her to her election whether she would accept such provision, or claim her dower.

We are of opinion that the provision must be held to have

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been in lieu of dower. Where there is no direct expression of intention that the provision contained in a will shall be in lieu of dower, the question always is whether the will contains any provision inconsistent with the assertion of a right to demand a third of the land to be set out by metes and bounds for dower. (1 Roper on Husband and Wife, 582; *Lewis v. Smith*, 9 N. Y. 502.) In this case it was clearly the intention of the testator that his wife should take all her interest in the real estate under the will, and upon the terms and conditions mentioned in the will; and, if she could at the same time claim dower in the real estate, it would certainly defeat the intention of the testator. He gives her the use and occupancy of all his real and personal estate upon express conditions, one of which is that she shall insure all the buildings. That was a condition which, if she failed to perform, would enable the children of the testator to claim a forfeiture. If she could have a third of the real estate set off for dower, and it so happened that all the buildings, or any of them were upon that third, those buildings she would not be bound, as widow, to insure, and they would be taken entirely out of the terms and conditions of the will. By another condition, his whole estate was made liable to pay the taxes and assessments from time to time imposed upon the real estate; and that condition would also be defeated as to so much of the real estate as might be set off to her for her dower. It was also made a condition that she should keep the whole estate in good repair, and if she failed to keep that condition, she would forfeit the estate. Thus all these conditions would be defeated as to so much of the estate as should be set off to her for dower. Hence this is a case where the intention of the testator cannot be fully carried out if the widow could claim her dower as well as the provision made by the will in her favor, and the disposition made by the will is so repugnant to the claim of dower that they cannot stand together.

It is undoubtedly true, as decided in the case of *Lewis v. Smith* (*supra*), that a simple devise of all the testator's real estate

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to his wife during life, would not be inconsistent with her claim of dower, and would not put her to an election. But here there is more; the devise to the widow for life is upon conditions which cannot have full force and effect unless dower is excluded. The terms of the will clearly indicate the purpose of the testator to require his wife to take under the will the entire interest which she was to have in his real estate.

The facts of the case show that the widow did make her election; that is, she entered upon the real estate and possessed it, and enjoyed it, as given to her by the will for more than one year after the decease of her husband. (1 R. S. 742.) The surrogate, therefore, was right in holding that the widow was not entitled to dower in the surplus money as claimed by her.

He was also right in holding that she was not entitled to the gross sum for the value of her life estate in the surplus to be estimated pursuant to rule 71 of the General Rules of Practice. Under that rule, except in the case of dower under sub-division 3 of section 2793 of the Code, a widow is not absolutely entitled to a gross sum in lieu of her annuity. The rule simply provides how the gross sum shall be estimated; and whether she shall have it, except in the case of dower, rests in the sound discretion of the court in view of all the circumstances. In many cases, to give an annuitant under a will a gross sum, would defeat the intention of the testator, as it would in this case, and in such cases it should be refused. Hence it was properly refused here.

The judgment of the General Term should be affirmed with costs against the appellant.

All concur.

Judgment affirmed.

Statement of case.

SUSAN E. MURRAY et al., Executors, etc., Respondents, v. PHEBE
MARSHALL, Appellant.

Although where an obligor and mortgagor sells and conveys the mortgaged premises subject to the mortgage, but with no covenant on the part of the grantee to pay, no technical relation of principal and surety arises between them, yet as the land is the primary fund for the payment of the debt, in respect thereto and to the extent of its value the grantee stands in the relation of a principal debtor, and the grantor has an equity similar to that of a surety.

Where, therefore, in such case the holder of the bond and mortgage by a valid agreement with the grantee, and without the assent or knowledge of the grantor, extends the time of payment of the mortgage, to the extent of the value of the land at the time of the agreement, the latter is discharged from liability upon his bond, to that extent the creditor practically takes the land as his sole security and assumes the risk of collecting that amount out of it.

In an action upon a bond the defense was that a mortgage was given as security for its payment; that defendant conveyed the mortgaged premises subject to the payment of the mortgage, and was discharged by an agreement made, without his assent or knowledge, between the plaintiff and the grantee, whereby in consideration of the payment by the latter of \$500 of the principal and the interest unpaid, the former extended the time of payment of the residue. The trial court found the facts as alleged in the answer, and directed a dismissal of the complaint; there was no finding or request to find as to the value of the land at the time of the extension, and on appeal to this court the evidence was not returned. Held, it was a fair inference from the facts found, that the value of the land equaled the amount of the mortgage debt; and that it might properly be assumed in support of the judgment.

Penfield v. Goodrich (10 Hun, 41), overruled in part.

(Argued January 16, 1884; decided February 8, 1884.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 12, 1882, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.

This action was upon a bond executed by defendant to plaintiffs' testator. The answer averred, and the court found in substance, that at the time the bond was executed, a mortgage was also executed by defendant to secure the payment thereof;

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Morgan, 10 id. 188; *Thayer v. Manly*, 73 id. 308.) Where, as in this case, the creditor is not privy to the transaction out of which the right of subrogation arose, notice must be brought home to him of the existence of such right before the effect claimed by the defendant for the extension in question can be insisted upon. (*Cheeseborough v. Millard*, 1 Johns. Ch. 409; *Ingalls v. Morgan*, 10 N. Y. 178; *Barnes v. Mott*, 64 id. 402; *Calvo v. Davies*, 73 id. 21.)

FINCH, J. The trial court held, that the extension by plaintiffs' testator of the time of payment of defendant's bond and mortgage, by a valid agreement with her grantee, who had taken a deed subject to the mortgage but without assuming its payment, operated to discharge the defendant wholly from liability. This conclusion rested upon the rule applicable to principal and surety, which forbids the former to change the essential terms of the contract without the consent of the latter, except at the peril of the surety's complete discharge. In most of these cases the courts have refused to enter upon the inquiry whether the surety was damaged or not by the change, and the justification of such refusal ordinarily lies in the fact that the surety is bound only by the contract which he made, and not by the new and substituted one which alone can be legally enforced. (*Ducker v. Rapp*, 67 N. Y. 473.) But the present is not a case of principal and surety in the strict and technical definition of such relation; and upon that fact the General Term founded a different view of the rights of the parties, and reversed the decision of the Special Term on appeal. Conceding that, by the conveyance subject to the mortgage, the land became the primary fund for the payment of the mortgage debt, and that the grantor in defense of his liability on the bond had the right to pay the mortgage debt and be subrogated to the remedies of the creditor, and so could enforce payment out of the land to the extent of its value (*Johnson v. Zink*, 51 N. Y. 336; *Flower v. Lance*, 59 id. 603), the General Term nevertheless held, affirming the authority of *Penfield v. Goodrich* (10 Hun, 41), that the mortgagor and grantor was all the time

the principal debtor, and the grantee only became such when he covenanted to pay the mortgage debt and assumed it as a personal liability. We do not approve of this conclusion, or the result to which it leads, and deem it our duty to affirm the decision of the Special Term, although not approving the doctrine upon which it rests, except with some necessary qualification.

While, as we have said, no strict and technical relation of principal and surety arose between the mortgagor and his grantee from the conveyance subject to the mortgage, an equity did arise which could not be taken from the mortgagor without his consent, and which bears a very close resemblance to the equitable right of a surety, the terms of whose contract have been modified. We cannot accurately denominate the grantee a principal debtor, since he owes no debt, and is not personally a debtor at all, and yet, since the land is the primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value in exoneration of the bond, it is not inaccurate to say that as grantee, and in respect to the land, and to the extent of its value, he stands in the relation of a principal debtor, and to the same extent the grantor has the equities of a surety. This follows inevitably from the right of subrogation which inheres in the original contract of sale and conveyance. It is a definite and recognized right, which, in the absence of an express agreement, will be founded upon one implied. (*Gans v. Thieme*, 93 N. Y. 232.) When the mortgagor in this case sold expressly subject to the mortgage, remaining liable upon his bond, he had a right as against his grantee to require that the land should first be exhausted in the payment of the debt. Presumably the amount of the mortgage was deducted from the purchase-price, or at least the transfer was made and accepted in view of the mortgage lien. Seller and buyer both acted upon the understanding that the land bound for the debt should pay the debt as far as it would go, and their contract necessarily implied that agreement. Through the right of subrogation the vendor could secure his safety, and that right could not be invaded with impunity. It

was invaded. When the creditor extended the time of payment by a valid agreement with the grantee, he at once, for the time being, took away the vendor's original right of subrogation. He suspended its operation beyond the terms of the mortgage. He put upon the mortgagor a new risk not contemplated, and never consented to. The value of the land, and so the amount to go in exoneration of the bond, might prove to be very much less at the end of the extended period than at the original maturity of the debt, and the latter might be increased by an accumulation of interest. The creditor had no right thus to modify or destroy the original right of subrogation. What he did was a conscious violation of this right, for the fact that he dealt with the grantee for an extension of the mortgage shows that he knew of the conveyance, and that it left the land bound in the hands of the grantee. Knowing this he is chargeable with knowledge of the mortgagor's equitable rights, and meddled with them at his peril. But it does not follow that the vendor was thereby wholly discharged. The grantee stood in the *quasi* relation of principal debtor only in respect to the land as the primary fund, and to the extent of the value of the land. If that value was less than the mortgage debt, as to the balance he owed no duty or obligation whatever, and as to that the mortgagor stood to the end, as he was at the beginning, the sole principal debtor. From any such balance he was not discharged, and as to that no right of his was in any manner disturbed. The measure of his injury was his right of subrogation, and that necessarily was bounded by the value of the land. The extension of time, therefore, operated to discharge him only to the extent of that value. At the moment of the extension his right of subrogation was taken away, and at that moment he was discharged to the extent of the value of the land, since the extension barred his recourse to it, and once discharged he could not again be made liable. From that moment the risk of future depreciation fell upon the creditor who by the extension practically took the land as his sole security to the extent of its then value, and assumed the risk of getting that value out of it in the

future. But the Special Term went further and held that the mortgagor was absolutely discharged by the extension. That might or might not be, and depended upon the question whether the value of the land equaled or fell below the debt. For conceding the general rule that the surety is discharged utterly by a valid extension of the time of payment, and that the mortgagor stands in the position and has the rights of a surety, it must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land; and beyond that is still principal debtor without any remaining equities.

In this case the evidence is not before us. We have only the pleadings and the findings of the court. They do not show directly that the value of the land at the date of the extension equaled the mortgage debt. But two things go far to justify such an inference. No claim that the value was less, and that the surety was only partially discharged appears to have been made on the trial. There was no request for such a finding, and the case seems to have been heard on the assumption that the value equaled the amount of the mortgage debt. But a very significant fact is found by the trial court. The grantee obtained the extension complained of by paying upon the mortgage the sum of \$500 of principal and \$87 of accrued interest. He was under no obligation to make this payment or procure the extension. The act is unexplainable except upon the theory that he deemed the land worth more than the mortgage, and that his interest was to pay off the incumbrance. It is an act which speaks as plainly as if he had said and the court had found that he had said that the land exceeded in value the amount of the mortgage. Every legitimate inference which the findings warrant, must be drawn to sustain the judgment founded upon them. In *Kellogg v. Thompson* (66 N. Y. 88) it was said that where the evidence given on the trial was not contained in the case, we must assume not only that the facts proved were sufficient to sustain the findings, but also any additional findings necessary to sustain the conclusion of law not in conflict with the affirmative facts found. That, in the

Opinion of the Court, per FINCH, J.

present case, the value of the land equaled the amount of the mortgage debt, is a fair inference from the facts which were found, is strengthened by the course of the trial so far as the absence of any such objection is concerned, and under the rule to which we have referred must be assumed in support of the judgment of the Special Term.

The judgment of the General Term should be reversed and that of the Special Term affirmed with costs.

All concur.

Judgment accordingly.

MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

DEWITT C. LITTLEJOHN, Individually and as Trustee, etc., et al.,
Appellants, v. HENRY Y. ATTEILL et al., Respondents.

A trespasser upon real estate may not invoke the aid of a court of equity to preserve to him the fruits of his wrong, by restraining the party who was in possession from resuming his lawful occupation which was taken from him by the trespasser.

(Argued October 10, 1883 ; decided November 20, 1883.)

THIS action was brought to restrain defendants from entering upon, or in any way obstructing plaintiffs' alleged possession of certain premises, being a sandy point of land formerly a portion of Rockaway Beach, in the county of Queens, to which land plaintiffs claimed title.

The court found upon evidence here found sufficient that plaintiffs had neither title nor possession, and that defendants were the owners and in possession. It appeared that the plaintiffs made a formal effort to gain possession by entering on the land in question, building a fence on what they claimed to be the boundary line between said lands and lands conceded to belong to defendants, and putting a man and boy in the occupation of a small house on the premises. When the defendants discovered this trespass they tore down the fence and the buildings, and maintained their possession with a force of men too large to resist. Thereupon the plaintiffs brought this action. The court say : " Having failed to show either title or posses-

sion at the time of their entry they became merely trespassers wrongfully intruding through their agents on the possession of the defendants. If the plaintiffs or the persons ejected have any right of action for the forcible removal, the remedy is at law, but they cannot maintain one in equity. Whether the defendants have lawful title or not, as to which we express no opinion, they were in possession and plaintiffs' entry was a trespass which equity will not protect or defend. An injunction to preserve to a wrong-doer the fruit of his wrong, and shut out the party in possession from his lawful occupation because taken from him by a trespasser would be the reverse of an equity. We think, therefore, the plaintiffs' complaint was properly dismissed."

Samuel Hand for appellants.

John E. Parsons for respondents.

FINCH, J., reads for affirmance.

All concur, EARL, J., in result.

Judgment affirmed.

HENRY F. BISSELL, Respondent, v. DORR RUSSELL, Appellant.

(Argued October 5, 1883; decided November 20, 1883)

Robert Sewell for appellant.

R. A. Stanton for respondent.

Agreed to affirm. No opinion.

All concur.

Judgment affirmed.

MARIA TICE, Respondent, v. HENRY N. MUNN, Appellant.

It seems that one whose negligence has occasioned a personal injury to another is liable for the proximate consequences of his act, although these are aggravated by reason of the delicate health of the person injured; the liability is not limited to such consequences of the injury as would have resulted if the person had been in good bodily health.

(Argued October 8, 1883; decided November 20, 1883.)

THIS action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

The court here held that the evidence sufficiently established the negligence alleged.

A point as to the charge, is stated and disposed of in the following extract from the opinion.

"The defendant asked the court to charge in substance, that if the plaintiff was in an unhealthy and debilitated condition, and the injuries were more serious and lasting by reason of her bodily condition, then the defendant is only liable for such consequences of the injury as would have resulted if she had been in good bodily health. The court refused to charge as requested, but stated the rule to be, that if by reason of a delicate condition of health, the consequences of a negligent injury are more serious still, for those consequences the defendant is liable, although they are aggravated by the imperfect bodily condition. To the refusal and the charge the defendant excepted. There was nothing in the case to call for the instruction sought. The proof utterly failed to show any weakened or imperfect bodily condition which aggravated the injury. What was suggested as a rheumatic attack two years before, proved to have been not such, and of no practical importance, and the court was asked to charge upon an abstract proposition having no just bearing on the case. But the charge was right. Taken in connection with the rule of damages several times repeated, it amounted to saying that the negligent party is responsible for the proximate consequences of his act, even though those consequences are more severe and aggravated by reason of delicate

health than they would have been if the sufferer had been sound and well. This does not allow damages for what the defendant did not proximately cause, but holds him responsible for such consequences in the particular case."

Robert P. Harlow for appellant.

Nathaniel C. Moak for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

JOSEPH DISHER, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued October 15, 1883 ; decided November 20, 1883.)

THIS action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

Plaintiff was a brakeman in its employ, and in consequence of the breaking of a brake-wheel he was thrown from a moving train and injured.

The propositions upon which the charge of negligence was based were that the brake-wheel was of a defective and insufficient pattern, which fact was known to defendant, and that it was weakened by an old fracture, which defendant's inspectors carelessly failed to discover. The court here held that the evidence failed to show any facts to sustain either proposition.

James F. Gluck for appellant.

John T. Murray for respondent.

FINCH, J., reads for reversal and new trial.

All concur.

Judgment reversed.

ANN REESE, Respondent, v. THOMAS BOESE, as Receiver, etc.,
Impleaded, etc., Appellant.

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(Argued October 11, 1883 ; decided November 20, 1883.)

THIS action was brought by plaintiff, a policy-holder, to procure the distribution of the fund in the possession of the superintendent of the insurance department, deposited for the security of the policy-holders of the National Life Insurance Company.

A claim was made on behalf of the American National Life Insurance Company, of Connecticut, to a distributive share by virtue of certain policies alleged to have been assigned to said company. The claim was made by two rival receivers, one of whom is the appellant, each claiming to represent the company, and to be entitled to receive such distributive share. The decision of the trial court, which was affirmed by the General Term, held that no claim existed on behalf of said company, and that neither of the receivers were entitled to any share. The court here held that the return disclosed no error, stating the rule thus: "The report of the referee, as well as the judgment of the Special and General Terms, having been adverse to the claim of the appellant to represent the company and to the right of said company to share in the distribution of the fund, it is incumbent upon him, in order to raise the questions presented, to show affirmatively from facts appearing in the record that the conclusions of law reached by the court, as to such claim, were erroneous. (*Phelps v. McDonald*, 26 N. Y. 82; *Carman v. Pultz*, 21 id. 547; *Grant v. Morse*, 22 id. 323.)"

* * * "Under the well-settled rules governing this court in the consideration of the determination of the trial court, we can indulge in no presumptions for the purpose of overthrowing a judgment, but as was said in *Carman v. Pultz* (*supra*), by Judge SELDEN, 'this court must presume nothing in favor of the party alleging error, but if compelled, through the imperfection of the statement of facts, to resort to presumptions at all, will adopt such only as will sustain the judgment.' When the evidence in a case is not brought before us by the record, and it does not affirmatively appear that no evidence was given

which would support the legal conclusion made by the court below, we are bound to presume in support of the judgment that such evidence was in fact given."

George N. Sanders for appellant.

Wm. H. Ingersoll and *Raphael J. Moses, Jr.*, for respondent.

RUGER, Ch. J., reads for affirmance.

All concur.

Judgment affirmed.

LEOPOLD BOLLERMANN et al., Appellants, v. CHARLES H. BLAKE, Respondent.

(Argued October 19, 1888; decided November 20, 1888.)

THIS was an action of ejectment brought by plaintiffs, who claimed as heirs at law of Charles Anthony Bollerman.

Carl Anton, a naturalized citizen of the United States, died intestate, May 18, 1866, seized of the lands in question. He left no descendants and no father or mother; but he left two brothers and one sister namely, Joseph, Casper and Margaretta, all of whom were unnaturalized aliens. Joseph died November 5, 1866, and whatever right he had in the land passed to his surviving brother and sister. The plaintiffs were, at the death of Carl Anton, his only relatives by blood, third cousins, who were also citizens of the United States. In 1845 a treaty which had previously been negotiated and ratified between the United States and Grand Duchy of Hesse was proclaimed, the first, second, third and fourth articles of which are as follows: I. "Every kind of *droit d'aubaine*, *droit de retraite* and *droit de detraction*, or tax on emigration, is hereby, and shall remain abolished between the two contracting parties, their states, citizens and subjects, respectively."

II. "Where on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a subject or citizen

of the other were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, — which term may be reasonably prolonged according to circumstances — and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction on the part of the government of the respective States.”

III. “The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other by testament, donation, or otherwise; and their heirs, being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as inhabitants of the country where the said property lies shall be liable to pay in like cases.”

IV. “In case of the absence of the heirs, the same care shall be taken provisionally of such real or personal property as would be taken in a like case of property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same according to article second, may take measures to receive or dispose of the inheritance.”

On the 28th day of April, 1868, Casper and Margaretta procured an act of the legislature of this State to be passed, which released all the interest of the State in the land left by Carl Anton to the persons who would be his heirs at law, and who would inherit the land, but for their alienage, and which further provides as follows: “And such person or persons and their heirs at law are hereby authorized to take, hold, sell and convey said lands and premises, or any interest they or either of them may have therein, in the same manner and with the same effect as if they were citizens of the United States.”

Held, that the deed from Casper and Margaretta conveyed a good title, and that plaintiff was not entitled to recover. As the opinion was not concurred in by a majority of the court, it is not reported in full.

C. C. Prentiss for appellant.

F. R. Coudert for respondent.

EARL, J., reads for affirmance; DANFORTH, J., concurs.

All concur in result.

Judgment affirmed.

OLIN S. LUFFMAN, Appellant, v. ROBERT T. HOY, Respondent.

(Argued October 22, 1883; decided November 20, 1883.)

John L. Hill for appellant.

H. E. Davies for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed and judgment absolute against plaintiff on stipulation.

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JAMES K. O. SHERWOOD, Appellant, v. SAMUEL T. HAUSER, Respondent.

Where a judgment entered upon the report of a referee is reversed by the General Term, upon questions of fact, in reviewing its decision here the decision of the referee will be upheld, unless it appears to be manifestly against or contrary to evidence. If it appear, upon examination of the whole evidence presented by the record, that it has force sufficient to uphold the findings of the referee, or if the evidence is so balanced, it can be seen that inferences drawn from the appearance and manner of testifying of the witnesses might turn the scale, it may be assumed that there were circumstances of the kind proper for the consideration of the referee, and that they affected his determination, and in such case his conclusions will be sustained.

In an action to recover for services as upon a *quantum meruit* plaintiff is not concluded as to the value of the service by the amount originally claimed in the complaint, where the latter has been amended by increasing the amount, nor is he concluded or impeached by discrepancies between different bills of particulars furnished.

(Argued October 23, 1883; decided November 20, 1883.)

THIS was an appeal from an order of General Term reversing, upon the facts, a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover as upon a *quantum meruit* for services alleged to have been rendered by plaintiff for defendant, and for expenses paid.

The opinion commences with this paragraph:

"The General Term has reversed the decision of the referee upon questions of fact, and by this appeal we are required to review its determination. (Code, § 1338.) It is, therefore, our duty to examine the whole evidence, and judge for ourselves whether it has force sufficient to uphold the plaintiff's allegations—if it has, or if the evidence as it appears upon the record is balanced, and we can see that inferences drawn from the appearance and manner of testifying of the witnesses might turn the scale toward the fact testified to, we may assume that there were circumstances of that kind proper for the consideration of the referee, and that they affected his determination as to the degree of credit which should be given to them. In either case his conclusion should stand, for in neither event could it be said to be manifestly against or contrary to evidence. (*Godfrey v. Moser*, 66 N. Y. 250; *Westerlo v. De Witt*, 36 id. 340; *Crane v. Baudouine*, 55 id. 256.)"

The court, after a consideration of the evidence, came to the conclusion that it did not appear either that the referee decided without evidence, or that the weight of evidence was clearly with the defendant, and therefore, that, under the rule laid down, the findings of the referee should be sustained.

The notice attached to the summons asked judgment for \$4,364.13. The complaint demanded judgment for \$5,800 and interest. On demand of defendant a bill of particulars was served, the total amount of the items in which was \$14,890.04. An amended bill of particulars was called for and served, the items in which amounted to \$13,275.

Upon the trial, after evidence as to the value of the services, plaintiff moved to amend the complaint. This was granted, so as to change the amount demanded to \$7,280 and interest, and the referee directed judgment for that amount.

The court say as to these changes :

"The circumstances adverted to by the ingenious counsel for the respondent have not been overlooked; *i. e.*, the discrepancies between the sum claimed in the summons and the several bills of particulars, showing the various values put by the plaintiff upon his services. But none of these could be in any sense conclusive against him. The amounts stated in the summons, as well as in the other papers, come in as admissions by the plaintiff, and of their discrepancy he gave such explanation as he could. It is not improbable. The suit was commenced in haste for the recovery of an unliquidated demand. The order for a bill of particulars led, it might be supposed, to such computations and reflections as to permit in the opinion of the plaintiff a larger claim, and the demand for a further bill, still more careful scrutiny, and as a result, another change. But the amount was in no case acquiesced in by the defendant, and, if the referee gave a sum less than the largest amount claimed by the plaintiff, it does not follow either that the referee erred, or that the plaintiff was impeached. (*Williams v. Glenny*, 16 N. Y. 389.) In that case an attorney presented a bill for services in several suits, in one of which the charge was in round numbers \$150; at the bottom of the bill was a statement, unsigned, in these words: 'The above is in full of all demands to this date.' It was not paid, and on suit brought by the attorney, he claimed and recovered \$500 in place of \$150. This court upheld the judgment, regarding the bill as an admission merely and that the presumption which the paper afforded might be overcome by evidence, entitling the plaintiff to recover the larger sum as on a *quantum meruit*. The same principle applies here. If, as the respondent urges, it is not apparent how the referee arrived at the amount actually due, he should have asked for a specific finding in regard to it."

Alfred C. Chapin for appellant.

Wm. Fullerton and *Henry S. Van Duser* for respondent.

DANFORTH, J., reads for reversal of order of General Term, and for affirmance of judgment, entered upon report of referee. All concur, except RAPALLO and EARL, JJ., not voting. Judgment accordingly.

JOSEPH F. MCCORMICK, Appellant, v. THE CITY OF SYRACUSE,
Respondent.

(Argued October 23, 1883 ; decided November 20, 1883.)

Louis Marshall for appellant.

M. A. Knapp for respondent.

Agree to affirm ; no opinion.

All concur, except RUGER, Ch. J., not sitting.

Judgment affirmed.

WILLIAM H. KIMBALL, as Receiver, etc., Appellant, v. FRANCES
ANN MYERS et al., Executors, etc., Respondents.

(Argued October 24, 1883 ; decided November 20, 1883.)

McCartin & Williams for appellant.

Samuel Hand for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed and judgment absolute against appellant on stipulation.

HENRY R. DUNHAM, Appellant, v. JOSEPH CUDLIFF, Impleaded,
etc., Respondent.

THIS case presented the same questions and was argued and decided with *Dunham v. Cudlipp* (*ante*, p. 129).

LEOPOLD G. BEATSE, Respondent, v. THOMAS R. SHARP as
Receiver, etc., Appellant.

(Argued October 25, 1883 ; decided November 20, 1883.)

Edward E. Sprague for appellant.

M. M. Budlong for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE FIRST NATIONAL BANK OF HELENA, MONTANA TERRITORY,
Respondent, v. JAMES K. O. SHEEWOOD, Appellant.

(Argued October 23, 1883 ; decided November 27, 1883.)

JUDGMENT in this case, entered upon the report of a referee, was reversed by the General Term upon questions of fact, that court holding the referee's findings to be "against the weight of evidence." Its views were concurred in by this court.

Alfred C. Chapin for appellant.

Henry S. Van Duzer for respondent.

FINCH, J., reads for affirmance of order of General Term and for judgment absolute against defendant on stipulation.

All concur.

Order affirmed and judgment accordingly.

GEORGE H. WOOSTER, Respondent, v. DAVID KISCH et al.,
Appellants.

(Argued October 26, 1883 ; decided November 27, 1883.)

Edmund Wetmore for appellants.

Thomas B. Browning for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN BRADY et al., Respondents, v. CASSIUS H. READ,
Appellant.

Where a release is unambiguous in its terms, oral evidence is inadmissible to show that it was intended to embrace other matters not specified therein.

(Argued October 26, 1883 ; decided November 27, 1883.)

THIS action was brought to recover for a quantity of coal and a number of empty oil barrels which the complaint alleged, plaintiffs sold to defendant.

Prior to the 27th day of September, 1877, the plaintiff, John Brady, was the lessee of certain property situated in the city of Brooklyn, known as "the Atlantic Oil Refining Works," and prior to that time, either alone or with the other plaintiffs, he had carried on the business of refining oil at that place. On that day he entered into an agreement with the defendant, whereby the latter agreed to furnish all the capital which might be required to carry on the business of refining oils at that place, "or to cause the same to be transacted in a good business-like manner at all times that the same can be run with profit, that the said Read will pay all rent and other expenses of every kind and nature which may be incurred therein, and to account to said party of the second part for all net profits, if any, and pay the one-half thereof to said party of the second part, monthly, until the 1st day of January, 1882," and Brady agreed "to allow the said party of the first part to carry on said business, or cause the same to be transacted, as in the best judgment of the party of the first part he, said Read, may deem advisable for the term aforesaid, but without any charge or liability as against said Brady," and that during the term he, Brady, would not sell or assign "the goods, chattels, tools, utensils and machinery" then belonging to the business, or any part thereof, without the written consent of Read. The property in question was on hand when defendant took possession, and was used by

him. The defendant claimed, among other things, that the property in question was purchased and paid for, and that plaintiffs executed a release in full of these and all other claims. As to the purchase and alleged release the court here say: "Brady did not by the agreement sell any personal property to Read, but Read, by implication, was to have the use of the personal property mentioned in the agreement. That personal property was clearly such only as was permanently used in carrying on the business, such as tanks, implements, machinery, etc. It does not appear to have included the coal, and barrels which were not kept for use, but which were consumed or disposed of by use. The personal property covered by the agreement was the same which Brady agreed not to sell or assign during the term, and could not have included personal property which was not to be kept during the term, but which was on hand only to be used up in the business.

Brady's evidence, which was submitted to and believed by the jury, showed that a few days after the agreement was made, he sold the coal and barrels on behalf of the plaintiffs to the defendant for an agreed price, and this showed, too, that the coal and barrels were not included or covered by the prior agreement. They were an expense in the business which the defendant was bound to incur and defray, and were all used up by him within two or three weeks after the sale of them to him.

Nothing occurred between the parties subsequently to discharge the defendant from his liability to pay for the property thus purchased.

On the 16th day of February, 1873, Brady executed an instrument under seal, in which in consideration of one dollar he relieved Read from all charges or claims founded on the agreement of September 27, 1877, or for the breach of any covenants contained therein, and declared that Read had acted fairly with him in every thing relating to that agreement, and the carrying out of the same, and that every matter embraced in that agreement had that day been fully settled and adjusted between them. The instrument also recited that Read had that day purchased from him, Brady, all the property mentioned in that agreement, and had become possessed of the same. If Read then purchased all the property mentioned in that agree-

ment, the coal and barrels were certainly not covered by that agreement, as they had before that day been used up, and thus could not then have been the subject of purchase. That release did not cover the purchase-price of the coal and barrels. Plaintiffs' claim for them was not founded on that agreement; nor was it for the breach of any covenant therein contained. It had no connection with the agreement, but it was for personal property subsequently sold to the defendant.

The coal and barrels were not included in the bill of sale executed by the plaintiff to the defendant on the 16th day of February, 1878, because they were not then in existence, and there is nothing in the terms of this bill of sale which covers that property, or the claim of the plaintiffs for the purchase-price thereof."

The counsel for the defendant asked a witness this question: "Will you be kind enough to state what took place in reference to the general release which I now hand you, about the execution of that paper?" This was objected to on the part of the plaintiffs, and the objection was sustained by the court, on the ground that every thing was merged in the written agreement, and that parol evidence was not competent to change the force of it. Defendant's counsel excepted to the ruling. The court say: "The release is not ambiguous in its terms and its scope could not be enlarged by parol evidence. The plain language used must be held to express the intent of the parties, and parol evidence was incompetent to show a different intent."

The following questions were also held to have been properly excluded: "What was said as to why a general release should not be given on the 16th of February?" "Why was the coal and barrels not entered into this agreement on the 16th of September, 1878?"

The court say: "It does not appear how it was important or material to show what was said as to why a general release should not be given. A release was given, and that speaks for itself. It was not stated how it could be important or material to show why the coal and barrels were not included in the agreement mentioned, and it does not appear that at that date

any agreement between the parties was made. It is clear that they were not included in any agreement, and if any competent or material evidence could have been elicited by these questions it should have been disclosed, so that the court could have known what it was and then made an intelligent ruling. It is sufficient now that we cannot perceive any legitimate purpose for which these questions could have been asked."

Samuel Hand for appellant.

Anthony Barrett for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

JOHN COLLERAN et al., Appellants, v. DAVID T. KENNEDY et al.,
Respondents.

(Argued October 26, 1883; decided November 27, 1883.)

ASIDE from questions as to facts, which were disposed of upon the ground that there was sufficient evidence to sustain the findings, there were various questions as to the reception of evidence; as to these the court here say: "An examination of the record shows that no reason for the objection was specified in any case, nor are the exceptions now supported upon grounds not capable of being obviated, had the attention of the adverse party been called to them."

E. H. Benn for appellants.

Edward G. Whitaker for respondents.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

EDWARD P. FURLONG, Appellant, v. ROBERT GAIR et al.,
Respondents.

(Argued November 17, 1883; decided November 27, 1883.)

Truman H. Baldwin for appellant.

Rastus H. Ransom for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN W. BROWN, Appellant, v. CHARLES C. SMITH et al.,
Respondents.

(Argued November 19, 1883; decided November 27, 1883.)

Hugo Hirsh for appellant.

Charles C. Smith for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

FIRST NATIONAL BANK OF MONTROSE, Appellant, v. WILLIAM
B. HAEWOOD, Impleaded, etc., Respondent.

(Argued November 20, 1883; decided November 27, 1883.)

B. F. Einstein for appellant.

J. M. Ferguson for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

In the Matter of the COLUMBIAN INSURANCE COMPANY.

(Argued November 20, 1883 ; decided December 4, 1883.)

John M. Bowers for appellants.

John McDonald for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK v. THE KNICKER-
BOCKER LIFE INSURANCE COMPANY.

(Argued November 20, 1883 ; decided December 4, 1883.)

Joseph Herzfeld for appellant.

John C. Keeler for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Accounting of BERTRAND CLOVER as
Assignee, etc.

(Argued November 20, 1883 ; decided December 4, 1883.)

Nelson Smith for appellant.

De Witt C. Brown for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

GEORGE P. DELISSER, Appellant, *v.* THOMAS A. O'KEEFE et al.,
Respondents.

(Argued November 22, 1883 ; decided December 4, 1883.)

John H. Clayton for appellant.

Samuel Greenbaum for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE WESTCHESTER GAS-LIGHT COMPANY OF THE CITY OF
YONKERS, Appellant, *v.* THE YONKERS GAS-LIGHT COM-
PANY, Respondent.

(Argued November 22, 1883 ; decided December 4, 1883.)

R. W. Van Pelt for appellant.

John E. Parsons for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILLIAM B. FITCH, Survivor, etc., Respondent, *v.* WILLIAM J.
BEST, Impleaded, etc., Appellant.

(Submitted November 23, 1883 ; decided December 4, 1883.)

J. I. & F. Werner for appellant.

King & Hallock for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

H. HUDSON HOLLY, Respondent, *v.* WILLIAM H. GUION, Appellant.

(Argued November 20, 1888; decided December 11, 1888.)

Nathaniel C. Moak for appellant.

Luke A. Lockwood for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

C. WILLIAM LORING, Respondent, *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

LUCY A. CLARK, Respondent, *v.* THE SAME, Appellant.

SARAH A. WHITMAN, Respondent, *v.* THE SAME, Appellant.

THESE cases presented the same question, and were argued and decided with *Clark v. L. S. & M. S. R. Co.* (*ante*, p. 217).

SUSAN A. ROGERS, Respondent, *v.* THE VILLAGE OF SANDY HILL et al., Appellants.

(Argued November 27, 1888; decided December 11, 1888.)

THIS action was brought to vacate an assessment and to restrain its collection.

The amount of the assessment was \$218.70.

The court say: "The action does not affect the title to real property, or an interest therein. We have, therefore, no jurisdiction to hear this appeal under sections 190 and 191 of the Code. The case of *Nichols v. Voorhis* (74 N. Y. 28) is precisely in point. (See, also, *Wheeler v. Scofield*, 67 id. 311; *Petris v.*

Adams, 71 id. 79; *Scully v. Sanders*, 77 id. 598.) The appeal should be dismissed."

H. Northrup for appellants.

James C. Rogers for respondent.

EARL, J., reads mem. for dismissal of appeal.

All concur.

Appeal dismissed.

WILLIAM R. SEWARD, Trustee, etc., et al., Respondents, *v.*
BURRELL SPENCER et al., Trustees, etc., Impleaded, etc., Appellants.

(Submitted December 8, 1888; decided December 11, 1888.)

O. O. Cottle for appellants.

J. B. Perkins for respondents.

Agree to reverse judgments of General and Special Terms.
Judgment ordered for defendants, dismissing the complaint
on opinion in *Seward v. Huntington* (*ante*, p. 104).

All concur.

Judgment accordingly.

In the Matter of the Application of the NEW YORK, WEST
SHORE AND BUFFALO RAILWAY COMPANY to acquire Title to
Lands of THEOPHILIA G. TOWNSEND et al.

(Argued December 4, 1888; decided December 11, 1888.)

D. P. Barnard for appellant.

F. L. Westbrook for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

JOHN O'REILLY et al., Appellants, v. THE CITY OF KINGSTON,
Respondent.

M. Schoonmaker for appellants.

Wm. Lounsbury for respondent.

Agree to dismiss appeal on authority of *Snebley v. Conner*
(78 N. Y. 218).

All concur.

Appeal dismissed.

BENJAMIN RUSSAK, as Survivor, etc., Appellant, v. JOHN SABEY,
Jr., Respondent.

(Argued December 4, 1888; decided December 11, 1888.)

M. M. Waters for appellant.

Louis Marshall for respondent.

Agree to affirm; no opinion.

All concur, except RUGER, Ch. J., who takes no part.

Order affirmed.

JACOB ODELL, as Survivor, etc., Respondent, v. JAMES MULEY
et al., Appellants.

(Submitted December 4, 1888; decided December 14, 1888.)

Townsend & Mahan for appellants.

Charles W. Seymour for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

MARY L. McKENNA, as Administratrix, etc., Respondent, v.
THOMAS BOLGER, Appellant.

(Submitted December 4, 1883; decided December 14, 1883.)

THE defendant demurred to the complaint herein upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained at Special Term, and judgment ordered for the defendant, but with leave to plaintiff to amend his pleading. Instead of doing so he appealed from the judgment to the General Term, where a motion to dismiss the appeal was denied, and from that decision this appeal was taken by the defendant.

The court here say: "There is nothing in the appeal papers to show upon what ground the motion was made, nor does it appear that the order was not one within the discretion of the Supreme Court. It is, therefore, not reviewable here. (*Cushman v. Brundrett*, 50 N. Y. 296.)"

John McCrone for appellant.

M. J. McKenna for respondent.

Per curiam mem. for dismissal of appeal.

All concur.

Appeal dismissed.

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EVERETT B. SANDERS, Respondent, v. THE LAKE SHORE AND
MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

Where interest is allowed, not by virtue of any contract to pay it, but simply as damages because of default in the discharge of an obligation the legal rate of interest must govern.

Where, therefore, in an action to require defendant to declare and pay dividends on certain preferred and guaranteed stock, it appeared that the dividends were due and payable prior to January 1, 1880, when the act (Chap. 538, Laws of 1879) fixing the rate of interest at six per cent went into effect, *held*, that plaintiff was entitled to interest at the rate of seven per cent up to that date, and six per cent thereafter.

(Submitted December 6, 1883; decided December 14, 1883.)

THIS action was brought to compel defendant to declare dividends upon certain shares of preferred and guaranteed stock issued by a railroad corporation which was consolidated and merged in the corporation defendant, and whose obligations defendant assumed.

The mem. of opinion is as follows :

"We think the evidence sufficient to show plaintiff's title to the dividends awarded to him. Prior adjudications in this court have settled all the questions in this case affecting the general merits. (*Boardman v. Lake Shore and Michigan Southern Railway Co.*, 84 N. Y. 157; *Jermain v. Same*, 91 id. 483.)

"The court below allowed plaintiff interest on the dividends from the time they were payable to the date of its decision, June 7, 1881, at the rate of seven per cent. The learned counsel for the defendant claims that the interest should have been computed at the legal rate, to-wit, at seven per cent to January 1, 1880, and then at six per cent from that time to January 7, 1881, and we think the claim well founded. This interest was allowed, not by virtue of any contract to pay interest, but simply as damages because the defendant was in default in the discharge of its obligation to the plaintiff, and wrongfully withheld money due him. In such a case, where interest is allowed as damages, it is well settled that the legal rate must govern. (*Bullock v. Boyd*, 1 Hoff. Ch. 294; *Bell v. Mayor, etc.*, 10 Paige, 49; *Brainard v. Jones*, 18 N. Y. 35; *Hamilton v. Van Rensselaer*, 43 id. 244; *Ritter v. Phillips*, 53 id. 586; *First Nat. B'k v. Fourth Nat. B'k*, 89 id. 412; *Wilson v. Cobb*, 31 N. J. Eq. [4 Stewart] 91; *Southerland on Damages*, 581, 666.)

"The judgment should, therefore, be modified by striking therefrom the sum of \$24.90 for excess of interest allowed, and as so modified, should be affirmed without costs to either party in this court."

Edward S. Rapallo for appellant.

Birdseye, Cloyd & Bayliss for respondent.

EARL, J., reads for modification as above, and for affirmance as modified.

All concur.

Judgment accordingly.

FRANCIS H. STODDARD, Respondent, *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

(Submitted December 6, 1883 ; decided December 14, 1883.)

Edward S. Rapallo for appellant.

Lucien Birdseye for respondent.

Agree to modify judgment by striking therefrom the sum of \$130.58 for excess of interest allowed, and as modified, affirmed on opinion in *Sanders v. L. S. & M. S. R. Co.* (*ante*, p. 641).

HENRY B. KRETZLER, Appellant, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Respondent.

THOMAS O'CONNER, Appellant, *v.* THE SAME, Respondent.

MICHAEL E. RILEY, Appellant, *v.* THE SAME, Respondent.

THESE cases presented the same question, and were decided upon the authority of *Kehn v. People State of New York* (93 N. Y. 291).

WILLIAM KELLY, Appellant, *v.* ANNA C. DEVLIN, as Administratrix, etc., et al., Respondents.

(Argued November 19, 1883 ; decided January 15, 1884.)

THE opinion simply discusses the evidence, holding there was sufficient to sustain the judgment.

Nelson J. Waterbury for appellant.

John H. Strahan, Albert Cardozo and Richard L. Newcombe for respondents.

Per curiam opinion for affirmance. •

All concur.

Judgment affirmed.

GEORGE L. WHITMAN et al., Respondents, v. ABEL HORTON,
Appellant.

(Argued December 6, 1883; decided January 15, 1884.)

N. A. Halbert for appellant.

Henry Stanton for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

GEORGE W. WELD et al., Respondents, v. BERNARD REILLY,
Sheriff, etc., Appellant.

(Argued December 7, 1883; decided January 15, 1884.)

Thomas G. Shearman for appellant.

Edward M. Shepard for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CHARLES E. WEMPLE et al., Appellants, v. DAVID M. HIL-
DRETH, Respondent.

(Argued December 11, 1883; decided January 15, 1884.)

Artemus B. Smith for appellants.

Robert S. Green for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

GEORGE C. GENET, Appellant, v. THE CITY OF BROOKLYN, Respondent.

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THIS action was brought to have certain assessments upon lands in the city of Brooklyn for the widening and improving of Sackett street, under the act chapter 631, Laws of 1868, set aside and declared void, and in the alternative to recover \$9,572 against the city, the amount of an award made by the commissioners of estimate and assessment for land, part of the lot assessed, taken for the improvement.

The court below decided against plaintiff upon both points, and directed a dismissal of the complaint.

The claim to set aside the assessment was based upon the ground that said act made no adequate provision for compensation, and so was unconstitutional, and that as there was no legal taking of the land, the assessment based thereon was unconstitutional and void. The court here say as to this, and as to the question of the liability of the city for the assessment: "The case of *Sage v. City of Brooklyn* (89 N. Y. 189), decided after the decision of this case, fully meets this point, and holds that the act did impose a direct liability upon the municipality to pay the awards made in the proceedings, and upon this ground the court sustained the constitutionality of the act. Upon the case as now presented, therefore, the plaintiff was not entitled to have the assessment set aside, and this relief was properly refused.

In disposing of the other question, to-wit, the claim of the plaintiff for judgment against the city for the amount of the award, the court based its decision upon two propositions: *first*, the lands taken for the widening of Sackett street were not taken by the city, and *second*, that the city was subjected to

no liability for the payment of the award. The case of *Sage v. City of Brooklyn* decides both of these propositions adversely to the defendant. It was held that the improvement was a municipal improvement, and also, as before stated, that the city became liable to pay the awards to the land owners. The judgment of the court denying the plaintiff's right to a judgment for the award, cannot be supported on the grounds upon which it proceeded, and we think the case for this reason must go back for a new trial."

It was insisted on behalf of the defendant that assuming the liability of the city to pay the awards to the land owners, there is nevertheless a right of set-off of unpaid assessments against awards, in cases of awards to persons who are also assessed for benefits, and that the plaintiff's assignor in this case having been assessed for benefit to his other land, resulting from the widening of Sackett street, this plaintiff as assignee can only recover the excess, if any, of the award over the assessment.

The court say: "This presents an important question. But it was not raised by the answer nor litigated on the trial, and there are no facts found which would justify the court in now deciding it.

The determination of the question between the parties requires a careful examination of the charter acts of the defendant, and of the various special statutes relating to the improvement, as well as a precise knowledge of the particular facts in respect to the assessments in question. We express no opinion on the point; upon a new trial the pleadings may perhaps be amended and the question properly raised."

George C. Genet, appellant, in person.

John A. Taylor for respondent.

ANDREWS, J., reads for reversal and new trial.

All concur.

Judgment reversed.

JOHN M. MASTERSON, Appellant, *v.* CALEB E. WHITAKER et al.,
Respondents:

(Argued December 10, 1883 ; decided January 15, 1884.)

Flamen B. Candler for appellant.

George V. N. Baldwin for respondents.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

CALEB E. WHITAKER, Respondent, *v.* IMPERIAL SKIRT MANU-
FACTURING COMPANY, Appellant.

(Argued December 12, 1883 ; decided January 15, 1884.)

THE principal questions presented were upon exception to findings of fact.

The court say: "We find no question of law improperly decided, nor any finding of fact unsupported by evidence. In such a case we have only to affirm the judgment. (Code, §§ 1337, 1338; *Reynolds v. Robinson*, 82 N. Y. 103; 37 Am. Rep. 555.)"

Flamen B. Candler for appellant.

George V. N. Baldwin for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

EWEN MCINTYRE, Respondent, *v.* WILLIAM E. STRONG, Appellant.

(Argued December 14, 1883 ; decided January 22, 1884.)

Henry S. Bennett for appellant.

William J. Gibson for respondent.

Agree to affirm ; no opinion.

All concur except DANFORTH, J., dissenting.

Judgment affirmed.

HENRY DANENBAUM et al., Respondents, *v.* LEHMAN H. MANDELBAUM, Appellant.

(Argued December 4, 1883 ; decided January 22, 1884.)

E. C. Boardman for appellant.

Rastus S. Ransom for respondents.

Agree to affirm on opinion in *Segelken v. Meyer* (*ante*, p. 473).

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants, *v.* THOMAS MCKEON, Respondent.

(Submitted January 14, 1884 ; decided January 22, 1884.)

I. Sam Johnson for appellant.

M. E. & E. M. Bartlett for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
GEORGE SMITH, Appellant.

Argued January 14, 1884 ; decided January 22, 1884.)

John D. Townsend for appellant.

John Vincent for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

HENRY CHAMBERLIN, Respondent, *v.* HARRIET A. BRADY et al.,
as Executors, etc., Appellants.

(Argued January 16, 1884 ; decided January 29, 1884.)

George H. Foster for appellants.

Edwin B. Smith for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

GEORGE WHITING et al., Appellants, *v.* JOACHIM LEBENHEIM
et al., Respondents

(Argued January 16, 1884 ; decided January 29, 1884.)

A. Blumenstiel for appellants.

John M. Carroll for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

GORDON MCKENZIE et al., Respondents, *v.* MARIA E. DECKER,
Administratrix, etc., Appellant.

(Argued January 21, 1884 ; decided February 5, 1884.)

THIS action was brought to recover a balance alleged to be due upon a contract between plaintiffs and Nicholas H. Decker, defendant's intestate, for the construction of a cemetery vault by the former for the latter.

The substance of the contract and the facts, so far as pertinent, as well as the holdings thereon, are given in the following extract from the opinion :

"The referee found as a fact that after the construction of the vault, the defendant expressed himself perfectly satisfied with the work. There was abundant evidence to sustain this finding and we must assume its truth in a further examination of the case. The contract provided for payment to be made to the builder in two installments — "one-half of the amount when the foundation is built, and the cut granite required for the vault is in Johnstown ; the balance of the price to be paid on the completion of the work to his, said Nicholas H. Decker's satisfaction." That it was so completed was established, and the balance remaining unpaid became due and payable, unless we are to heed the criticism of the learned counsel for the appellant that it was not so completed by the builder, but was finished by Decker himself. The difficulty grew out of a disagreement as to the meaning of the contract. The builder was about to put on the fourth roof stone, which was a limestone, when the defendant insisted it should be granite. The builder refused to make the substitution, and Decker did it himself, charging against the builder the cost of the change, and also that of the steps, cut out of a single block, instead of being made separate. The courts below have sustained Decker's construction, and allowed to him, upon his demand, the amount expended by him for the granite roof stone. Practically, therefore, the placing of the fourth stone of granite, although furnished under Decker's direction, and upon his responsibility, has been paid for by the builder by

its application on the contract-price, and as by the judgment it has been furnished at his expense, it may fairly be said to have been furnished by him so that the balance of the contract-price became due even on the appellant's construction. And that it was so due and payable Decker admitted, for he offered to pay what he conceded to be due, which was less than the builder claimed, and the offer negatived any claim that nothing was due, which would have been the case if Decker had stood upon the ground that the vault had not been completed to his satisfaction. It is to be observed also that the stipulation in the contract is a very rigid and dangerous one. It puts a power in the hands of the one party which may be wielded very harshly and severely against the other, and we ought not to construe it with any unnecessary liberality in favor of one who possesses it. By the terms of the contract, payment became due upon the completion of the vault to Decker's satisfaction. It was so completed, and the only further question was how much was due to the builder growing out of Decker's payments for material. The defendant cannot be permitted to hold two inconsistent positions. If he insisted that Oliver was in default and did not complete the vault, then he owed him nothing, and should not have offered payment and recognized a liability, nor charged against Oliver what he himself paid for his own completion of the work. But in his answer he alleged that he had paid not \$2,500, which was the first installment of the contract-price, but \$4,440, a sum which could only be reached by charging all of his advances to Oliver, including the granite roof-stone, and treating him as having carried the work to completion, and as responsible for it to the end. The peculiar circumstances of the case take it out of the general rules, which the appellant's counsel invokes."

Ira D. Warren for appellant.

Eugene H. Pomeroy for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

MARGARET COSGROVE, as Administratrix, etc., Respondent, *v.*
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

EMMA T. BARRINGER, as Administratrix, etc., Respondent, *v.*
THE SAME, Appellant.

(Argued January 21, 1884 ; decided February 5, 1884.)

Frank Loomis for appellant.

Homer A. Nelson for respondent.

Agree to affirm ; no opinion.

All concur.

Judgments affirmed.

JOSEPHINE R. BARON et al., as Executors, etc., Respondents, *v.*
GEORGE SPIES et al., Appellants.

(Submitted January 22, 1884 ; decided February 5, 1884.)

H. M. Wilbur for appellants.

James A. Ward for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

PETER V. Z. LANE, Appellant, *v.* JEDEDIAH K. HAYWARD,
Executor, etc., Respondent.

(Argued January 24, 1884 ; decided February 5, 1884.)

S. T. Freeman for appellant.

Jedediah K. Hayward, respondent, in person.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM TOZER, as Administrator, etc., Respondent, *v.* THE
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, Appellant.

(Argued January 24, 1884; decided February 5, 1884.)

George C. Greene for appellant.

Myron H. Peck, Jr., for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CULLEN P. GRADIN, Respondent, *v.* YSIDORA HERNANDEZ
MORLJON, Impleaded, etc., Appellant.

(Argued January 24, 1884; decided February 5, 1884.)

George H. Forster for appellant.

John L. Logan for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

HARLAN H. SACKRIDER et al., Respondents, *v.* ALICE A. COOKE,
as Executrix, etc., Appellant.

(Argued January 24, 1884; decided February 5, 1884.)

Day & Romer for appellant.

Frank W. Stevens for respondent

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
THEODORE HOFFMAN, Appellant.

(Argued January 29, 1884 ; decided February 5, 1884.)

B. W. Travis and *Hiram Paulding* for appellant.

Nelson H. Baker for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

PATRICK SHEAHAN, Appellant, *v.* THE NATIONAL STEAMSHIP
COMPANY, Respondent.

(Argued January 23, 1884 ; decided February 5, 1884.)

John Chetwood for motion.

Patrick Sheahan opposed.

Motion to dismiss appeal granted ; no opinion.

All concur.

HENRY C. SIMMS, Respondent, *v.* GEORGE VOGHT et al., Ap-
pellants.

(Submitted January 16, 1884 ; decided February 8, 1884.)

THIS was an action of ejectment to recover possession of cer-
tain premises situated in the city of Brooklyn.

Plaintiff claimed title under a deed given on a foreclosure sale. It was conceded that the mortgagor was at the time of the execution of the mortgage the owner in fee of the premises. Defendants claimed the right of possession under certain leases and certificates on sale of the premises for non-payment of taxes and water rents.

The opinion, which is given in full, states the facts so far as pertinent to the points presented.

"It must be assumed that the various leases and certificates given by the city of Brooklyn upon sale of the premises in question for non-payment of taxes and water rents, and under which the defendant claims title and possession, were invalid by reason of defects pointed out at the trial, for the appellant in no respect controverts the grounds upon which their insufficiency was adjudged. His claim is that 'whether they were valid or invalid, the plaintiff's title was taken subject and subordinate to them. This contention is placed upon the usual direction to the referee contained in the judgment of foreclosure, 'that out of the moneys arising from the sale of the mortgaged premises,' he shall retain 'the amount of any lien or liens upon them at the time of such sale, for taxes or assessments.' It is not pretended that any money was retained for that purpose, or that the purchaser undertook their payment. It may, however, be granted that the purchaser took his title subject to any lien which then existed. But the judgment in favor of the plaintiff was predicated upon the finding that no lien was imposed by the tax proceedings, and if invalid, the defendants could acquire no right under them.

"It is also contended by the appellants that no evidence was given of the value of the rents and profits, and, therefore, that the trial judge erred in allowing for them more than a nominal amount. We are, however, referred to no exception which raises this question, and can find only the general exception to each and every part of the finding and conclusion of the trial court. This, as is well settled, is insufficient if any part of the conclusion is good, and as we have already seen the judgment, in its general aspect, is without error. If the appellants are right upon the point now raised, the excess is definite and cer-

tain, and in such a case judgment will not be reversed on account of it, if the prevailing party is willing to remit, and that he may make his election at the earliest opportunity, the error should be pointed out. (*McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463.) So far as the record shows, the point is made now for the first time. It cannot prevail. The other grounds argued relate to mere irregularities in the proceedings of foreclosure, and are not available in this action.

"The judgment appealed from should be affirmed, with costs."

John H. Clayton for appellants.

D. P. Barnard for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

JOHN J. TOWNSEND, Respondent, v. THE NEW YORK LIFE INSURANCE AND TRUST COMPANY as Administrator, etc., Appellant.

(Argued January 21, 1884 ; decided February 8, 1884.)

REVERSED on the ground that there was not evidence sufficient to sustain certain of the referee's findings of fact.

Ira D. Warren for appellant.

Joseph H. Choate for respondent.

DANFORTH, J., reads for reversal.

All concur.

Judgment reversed.

INDEX.

ACCOMPLICE.

It seems that one who purchases a lottery ticket for the purpose of detecting and punishing the vendor, not with intent to aid in the commission of the offense, is not an accomplice within the meaning of the provision of the Code of Criminal Procedure (§ 399), declaring that a conviction cannot be had upon the uncorroborated testimony of an accomplice. *People v. Noelke*. 187

ACCOUNT (ACTION FOR).

Where an agent has been intrusted with his principal's money, to be expended for a specific purpose, the former may be required to account in equity; and upon such an accounting the burden is upon him of showing that his trust duties have been performed, and the manner of their performance. *Marvin v. Brooks*. 71

ACCOUNTING.

1. A petition presented to a surrogate set forth that J. was trustee under the will of McC.; that the petitioner was by the terms of the will entitled to the interest on the trust fund, which was so invested as to yield an annual income, of which at least \$337.50 was then in the hands of the trustee, and that he refused to pay it over, claiming that the petitioner had assigned his interest, which claim, the petitioner averred, was unfounded. *Held*, that the petition was sufficient to entitle the petitioner under the Code of Civil Procedure

(§§ 2803, 2804) to an order for an accounting. *In re McCarter*. 558

2. The answer did not deny the validity or legality of the petitioner's claim, but set up the pendency of an action in which the trustee was plaintiff and the petitioners and others were defendants, for the purpose of settling conflicting claims, alleged by the trustee to have been made upon the fund and its income. No proof was given in support of these allegations. *Held*, the facts stated did not in any way tend to show that the petitioner's claim was of doubtful validity, or that the action was necessary; but if this were otherwise, in the absence of the denial of validity or legality required by the Code (§ 2805), the pendency of the action was immaterial, and was no bar to an accounting. *Id.*

ACTION.

The complaint herein alleged the employment of defendant as attorney, etc., and that while so employed he received the money in question "in a fiduciary capacity," that the same had been demanded, but that he neglected and refused to pay the same and had converted it to his own use. *Held*, that the cause of action was one *ex contractu* not *ex delicto*. *Sagelken v. Meyer*. 473

ADVERSE POSSESSION.

1. The provision of the Revised Statutes, declaring a grant of land void if at the time of delivery thereof the land shall be in the

actual possession of one claiming under a title adverse to that of the grantor, does not apply to a deed from an assignee in bankruptcy, made in pursuance of an order of the bankruptcy court. *Coleman v. M. B. Imp. Co. (Limited)*. 229

2. One holding the legal title to lands, although not actually occupying, will be considered as constructively in possession thereof, unless they are in the actual hostile occupancy of another under a claim of title. *Bliss v. Johnson*. 235
3. Where the true owner has been dispossessed, if the dispossession terminates within twenty years, the possession will be considered as having returned to him; to defeat his title the adverse possession must be continuous for twenty years. *Id.*
4. One J. held the legal title to the whole of a highway; S., to whose title plaintiff succeeded, took title, in 1837, to a farm adjoining the highway under a deed which by its terms bounded the lands on the north by the center of the highway; immediately thereafter S. built a fence extending one rod into the highway, along the entire north line of his farm, and he and his successor in title continued to occupy the inclosed strip under claim of title until 1846, when, upon a survey establishing J.'s title to the whole highway the fence was removed back to the south line thereof, and thereafter no part of it was inclosed. From 1867, when plaintiff purchased and took possession, down to 1875, he occupied a strip of land one rod wide adjoining his farm, by plowing, cultivating and mowing it each year. *Held*, that conceding both of these periods of occupation were hostile in inception and continuous in character and sufficient to initiate a claim to an adverse possession, they did not bar the right of the true owner as there was not a continuous adverse possession for twenty years. *Id.*
5. During the period between 1846 and 1867, T., plaintiff's predecessor in title, once a year cut the grass from a small plat of ground in the highway, a row of trees was also planted by him in the highway in 1864, which were within a few years thereafter taken up or destroyed, and he sometimes piled lumber in the highway against his fence. He did not occupy the highway in any other manner. *Held*, that the evidence failed to establish a claim by adverse possession. *Id.*
6. The setting out of trees or the building of a sidewalk in a highway by the owner of adjoining lands, as authorized by the act of 1863 (Chap. 93, Laws of 1863), is not such an occupation as can be made the foundation of a claim to title by adverse possession as against the true owner. *Id.*
7. A tenant cannot by a disclaimer, or by mere words denying his landlord's title and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. The possession of the tenant and of his grantees and assigns is that of the landlord, and not hostile or adverse; and this is so as to a grantee who has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation. *Whiting v. Edmunds*. 309
8. The possession of the tenant, thus in subordination to the title of the landlord, continues, not only during the term, but is presumed to remain unchanged until twenty years after the termination thereof, and notwithstanding any claim of the tenant or his successors to a hostile title. (Code of Civil Procedure, § 373.) *Id.*
9. To rebut this presumption and initiate an adverse holding, the tenant must do something equivalent to a surrender of possession to the landlord and bring home to him knowledge of the adverse claim. *Id.*
10. In an action of ejectment, it appeared that the premises in question were, in 1824, in the possession

of a tenant who held under a lease from W., dated in 1823, and running for twenty years. In order to get possession, R. T., who had or claimed a title under a deed from B., employed I. to purchase the lease, which he did with the money of R. T., taking an assignment, however, in his own name. By collusion with I., and without the knowledge of the landlord, R. T. entered into possession, asserting title under the deed from B. The lease, however, was found in his possession, and he made several efforts to buy the W. title. Plaintiff claimed under deeds from the heirs of W. to C., executed in 1858 and 1859. The premises were then in the possession of grantees of G. F. T., who entered under a deed in 1846. It was admitted by defendants that R. T. "and the grantees under him have been in possession * * * and that defendant is now in possession under that (R. T.'s) claim of title." The trial court refused to submit to the jury the question as to the character of R. T.'s entry into possession, and nonsuited plaintiff. *Held* error; that if R. T., when he entered in 1824, became the tenant of W., his possession and that of his grantees remained the possession of his landlord not only until the end of the term, but presumably for twenty years thereafter, *i. e.*, until 1863, and so there was no adverse possession at the time of the conveyance to C. making his deed void for champerty; and that, therefore, the question as to the character of R. T.'s possession should have been submitted to the jury. *Id.*

— *Party cannot claim right by adverse possession, where use of another's land is by consent.*

See Cronkhite v. Cronkhite. 323

ALIEN.

— *As to rights of citizens of the Grand Duchy of Hesse to hold and convey real estate under the treaty of 1845.*

See Bollerman v. Blake. (Mem.) 624

APPEAL.

1. The General Term of the Supreme Court has no authority on appeal to determine the amount of unsettled damages; at least where no facts are found below upon which an estimate as to the true amount can be made. *Andrews v. Tyng.* 16
2. Accordingly *held*, where on trial before a referee in an action for attorney's services wherein the defendant set up a breach of the contract of employment on the part of plaintiffs, and the referee found the breach, but allowed only nominal damages, and where the General Term decided this to be erroneous and that defendant was entitled to substantial damages, that it was error for the General Term to fix the damages; that it only had authority to order a new trial, so that the amount of damages might be determined by a trial court. *Id.*
3. In an equity action brought to set aside alleged fraudulent conveyances made by a judgment debtor, the defendant is not entitled to a jury trial. The court may frame issues and direct them to be tried before a jury, but this is in its discretion, and its determination is not the subject of review. *Wright v. Nostrand.* 81
4. Where the alleged fraudulent conveyances were of the debtor's real estate to his wife, and the judgment set them aside, *held*, an objection to such judgment, that it did not provide for the wife's right of dower, could not be raised on appeal; that the remedy, if any, was by motion. *Id.*
5. On trial of an action for libel, where the alleged libelous publication contained charges injurious to plaintiff's character and to his business, and the complaint averred that by reason of the libel plaintiff had been greatly injured in his business, by the loss of good-will and patronage, plaintiff was permitted to testify as a witness that immediately after the publication his business fell off, and to state the amount of his daily

- sales up to and immediately after such publication. The questions were objected to generally. *Held*, defendant could not object on appeal that the complaint was not specific enough to authorize proof of special damage. *Bergmann v. Jones*. 51
6. Where evidence is received under a general objection, the ruling will not be held erroneous unless there are grounds of objection, which could not have been obviated had they been specified, or unless the evidence in its essential nature is incompetent. *Id.*
7. A complaint contained a count for false imprisonment, and also one for malicious prosecution. On trial a motion by defendant's counsel to dismiss the complaint as to the last cause of action was denied; as to it, however, the jury found for defendant, but rendered a verdict for plaintiff upon the first cause of action. *Held*, that the denial of the motion, even if erroneous, could have had no injurious effect, and so was not ground for reversal. *Thorne v. Turck*. 90
8. An order of General Term affirming an interlocutory judgment is not appealable. *Raynor v. Raynor*. 248
9. *It seems*, that the party aggrieved must wait until final judgment is entered, when he may either appeal directly to this court (Code of Civil Procedure, § 1886), in which case the appeal will bring up for review only the determination of the General Term, affirming the interlocutory judgment, or he may appeal to the General Term (§ 1850), which appeal will bring up for review only the proceedings after the interlocutory judgment, and in case of affirmance he may appeal to this court, which appeal will present for review all the questions of law involved in the whole case. *Id.*
10. *It seems* also, that where the General Term, on appeal from either the interlocutory or the final judgment, grants a new trial, an appeal may be taken to this court (§§ 190, 191). *Id.*
11. *It seems*, that a party aggrieved by an interlocutory judgment may also, after entry of the judgment, move for a new trial (§ 1001) on one or more exceptions contained in a case settled as prescribed (§ 997), and from the order granting or refusing the motion an appeal may be taken to this court (§ 190). *Id.*
12. An order of General Term, vacating the report of commissioners appointed in proceedings by a railroad corporation to acquire title to lands and the confirmation thereof, and directing a new appraisal before new commissioners, is not reviewable here. *In re N. Y. W. S. & B. R. Co.* 287.
13. The General Term, however, has no power on appeal by the company from the order of confirmation to award costs against the owners. *Id.*
14. Where costs are awarded, so much of the General Term order is reviewable here; but this does not confer jurisdiction to review the whole order. *Id.*
15. As to whether the general provisions applicable to appeals to this court extend to condemnation proceedings under the Railroad Act, *quære*. *Id.*
16. Upon motion to dismiss an appeal by a railroad company to the General Term from an order of Special Term confirming the report of commissioners appointed to condemn certain lands under water in the Hudson river, it appeared that under former proceedings the company had obtained possession and begun the construction of an embankment; these proceedings were subsequently annulled and the present proceedings instituted. On application of the company an order was granted allowing it to continue in possession until the final conclusion of the new proceedings, but requiring it to keep open a gap in the embankment for the benefit

- of the land-owners. The order confirming the commissioners' report provided that, on payment of the sums awarded, the company have full possession, and annulled all orders inconsistent with such possession. The company paid the awards and immediately closed up the gap. *Held*, that by so doing it did not waive its right of appeal from the order; that independent of the order, on payment of the awards, the condemnation was complete and final, the company was entitled to take full possession, the owners were divested of all estate and interest (§§ 17 18, chap. 140, Laws of 1850), and nothing could be reviewed upon the appeal but the amount of the awards; and so, the company did not avail itself of any benefit conferred by the order appealed from, which should preclude it from appealing. *Id.*
17. It is the duty of this court to harmonize the findings of a trial court so as to arrive at the real intention, if it can be done, and an intention to reverse a deliberate finding will not be imputed because of collateral findings in which an inadvertent or immaterial expression is used. *Bennett v. Bates*. 354
18. In an action upon a guaranty of payment of rent, reserved by a lease of certain rooms in a building, defendants set up, by way of counter-claim, and proved damages to the furniture and fixtures of the lessee by reason of a flow of water from other parts of the building under the control of the lessor, because of defective water pipes, which he, after notice, omitted to keep in order, and an assignment of such damages to defendants. No question was raised upon the pleadings, and no objection was made upon the trial that the liability of the landlord was not the proper subject of a counter-claim. *Held*, that it could not be raised upon appeal. *Vann v. Rouse*. 401
19. An appellant is simply bound to present his case to the General Term upon the case as settled, and to this court upon the same record; he is not bound to print matter proposed by the respondent as an amendment to the case but disallowed by the trial judge. *Küner v. N. Y. C. & H. R.* 495
20. It is not the object of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court, and they cannot, therefore, be properly referred to to ascertain the grounds of decision. *Scott v. Morgan*. 508
21. Where, therefore, a case as settled stated the grounds upon which a motion to dismiss the complaint was made and granted, *held*, that this was controlling and respondent could not refer to the minutes, although incorporated in the record, to show that the motion was also based upon other grounds than those stated in the case. *Id.*
22. But *held*, that the respondent had the right, in support of the judgment, to urge any sufficient ground appearing from the record which he might have raised in the court below, provided it could not have been obviated had it been raised on the trial. *Id.*
23. As to whether, where upon motion to substitute as plaintiff one to whom it is claimed plaintiff has transferred his interest, the court decides the question in favor of substitution, and without permitting allegations to be framed which will let in the new issue at the trial, its order is reviewable here, *quære*. *Smith v. Zulinski*. 510
24. *It seems* that the legislature infringes no right of the defendant by not allowing an appeal to this court. *Id.*
25. *It seems* also that such an order of substitution is not final and conclusive; it may be reviewed on appeal to the General Term, the motion may be renewed with the consent of the court, or without that consent, upon a new and different state of facts, or where default was made, the default may be opened. *Id.*

26. It is within the discretion of the court on a criminal trial to fix a limit upon the time to be used by counsel in summing up the case to the jury, and unless it appears that the discretion has been abused, it is not a subject for review on appeal. *People v. Kelly.* 526
27. After the granting of a General Term order herein, which in effect gave the defendant liberty to inspect plaintiffs' books and papers, plaintiffs moved, at a Special Term, on additional facts, for an order vacating or limiting the General Term order; the motion was denied on the ground that plaintiffs' remedy was by application to the General Term, but a stay of proceedings was granted for the purposes of such an application, unless defendant would stipulate to take an inspection under the supervision of a referee. Defendant refused to stipulate and appealed. The General Term affirmed the order, and, upon the new facts presented, vacated its former order, and prohibited the making of a new order for an inspection. *Held*, that an inspection having been granted upon terms which the Special Term could lawfully impose, upon defendant's refusal to accept those terms it was in the discretion of the General Term to deny the inspection entirely, and the exercise of this discretion was not reviewable here. *Clyde v. Rogers.* 541
28. After trial of an action on contract, and after the decision of the court, but before judgment, an order of arrest was issued and served; it was granted on affidavits establishing fraud *prima facie*. *Held*, that the order was in time; and that although the averments in said affidavits were denied by defendant's opposing affidavits, the questions of fact were for the court below to pass upon, and its determination was not reviewable here. *Humphrey v. Hayes.* 594
29. Where a judgment entered upon the report of a referee is reversed by the General Term, upon questions of fact, in reviewing its decision here the decision of the referee will be upheld, unless it appears to be manifestly against or contrary to evidence. If it appear, upon examination of the whole evidence presented by the record, that it has force sufficient to uphold the findings of the referee, or if the evidence is so balanced, it can be seen that inferences drawn from the appearance and manner of testifying of the witnesses might turn the scale, it may be assumed that there were circumstances of the kind proper for the consideration of the referee, and that they affected his determination, and in such case his conclusions will be sustained. *Sherwood v. Hauser.* 626
- When order improperly granted allowing receiver of a firm to come in and defend an action against members of firm, and when reviewable here. *See Honegger v. Wettstein.* 523
- Costs of unsuccessful appeal by testamentary trustee from decree of surrogate in proceedings to compel him to account, may be imposed upon him individually. *See In re McCarter.* 553
- General objection to evidence not available on appeal save where the objection could not have been obviated had it been specified. *See Colleran v. Kennedy. (Mem.)* 634
- Judgment in action to vacate assessment, where assessment is less than \$500 not reviewable here. *See Rogers v. Village of Sandy Hill. (Mem.)* 638
- Where on appeal from order of General Term denying motion to dismiss appeal it does not appear that the order is not one in discretion of that court it is not reviewable here. *See McKenna v. Bolger. (Mem.)* 641

APPLICATION OF PAYMENTS.

1. A debtor paying money to a creditor, to whom he owes several debts, must, as a general rule, exercise his option as to the application of

the payment at the time it is made. *B'k of California v. Webb.* 467

that an explicit contract was made to that effect. *Hancock v. Rand.* 1

2. If no direction is then given by him the creditor may control the application ; and, as between him and the debtor, there is no limit of time within which he must make the application, save that it be before it is made under the direction of the court, at least unless the debtor requests him to exercise his option. *Id.*

3. Defendants guaranteed the payment of all drafts drawn by A. upon the A. G. Co. during a period ending July 31, 1879, provided the amount guaranteed should not at any one time exceed \$13,000; the guaranty to be continuous, and upon payment of any draft, to be in full force as to any others until payment of the last draft drawn during the period named. A. drew a draft for \$13,000, and subsequently another for \$8,000, neither of which was paid at maturity. In an action upon the guaranty the complaint averred the non-payment of the first draft. Defendants alleged and gave evidence tending to show a payment made after the commencement of the action of \$2,144 ; more than a year thereafter it was credited by plaintiff against the \$8,000 draft. *Held*, that plaintiff had the right to so credit it ; but that even if this were otherwise, as if credited upon the first draft the guaranty would then attach to so much of the second, no harm was done defendants by the application, and if none had been made, such an application by the court would have been just and equitable, and would have been sanctioned by established rules. *Id.*

ARMY.

Persons belonging to the army and navy, who have no permanent residence they can call home, are to be regarded as travelers when stopping at publicinns ; to deprive them of their privileges as such, and to give them the character of boarders merely, it must appear

ARREST.

1. In the cases where under the Code of Civil Procedure (§ 550) the right to arrest depends upon facts extrinsic the cause of action, and where no execution against the person can issue unless an order of arrest has been obtained and executed before judgment, these extrinsic matters need not be alleged in the complaint, and if alleged, are immaterial to the cause of action and need not be proved upon the trial. *Segelken v. Meyer.* 478

2. As the act of 1879 (Chap. 542, Laws of 1879), amending the provisions of the Code of Civil Procedure (§ 549) in reference to arrest, by authorizing an arrest in an action on contract where fraud is alleged in the complaint, and declaring that where such an allegation is made, plaintiff cannot recover without proving fraud, by its terms (§ 2), does not apply to actions theretofore commenced, it is not essential in such an action where the defendant has been arrested on affidavits charging fraud, to amend the complaint by inserting therein allegations of fraud, nor is it necessary to prove the fraud on the trial. *Humphrey v. Hayes.* 594

3. After trial of an action on contract and after the decision of the court, but before judgment, an order of arrest was issued and served ; it was granted on affidavits establishing fraud *prima facie*. *Held*, that the order was in time ; and that although the averments in said affidavits were denied by defendant's opposing affidavits, the questions of fact were for the court below to pass upon, and its determination was not reviewable here. *Id.*

ASSESSMENT AND TAXATION.

— *Judgment in action to vacate*

assessment where assessment is less than \$500, not reviewable here.

See Rogers v. Village of Sandy Hill. (Mem.) 638

— *The act for widening Sackett street, in the city of Brooklyn, constitutional, and city liable for assessments under it.*

See Genet v. City of Brooklyn. (Mem.) 645

ASSIGNMENT.

1. As a general rule contingent interests are assignable, devisable and descendible the same as vested interests. *Kenyon v. See.* 638

2. In an action upon a guaranty of payment in an assignment of a bond and mortgage for \$1,250 it appeared that at the time of the assignment there was another mortgage upon the premises, bearing the same date and recorded at the same time as the assigned mortgage. The holder of the other mortgage obtained a decree of foreclosure thereon, which plaintiff purchased for the sum of \$669.65; the mortgaged premises were sold under the decree to plaintiff for \$100. The defendants were not parties to the foreclosure and it did not appear that they had any knowledge of the foreclosure or the sale. The value of the premises at the date of the assignment was \$3,000, and at the time of sale \$1,500. *Held*, that as the acts of plaintiff were injurious to the rights of the guarantors they were thereby discharged, either wholly or to the extent to which the security was impaired, i. e., the proportionate part of the value of the mortgaged premises at the time of sale, applicable upon the guaranteed mortgage. *Humphrey v. Hayes.* 594

3. *It seems* that the assignee in such a case is not bound to exercise diligence, and until required by the guarantor to enforce his bond and mortgage, delay in so doing, and a consequent impairment of the security, is no defense. He is not at liberty, however, to do any affirma-

tive act impairing the security; the guarantor on payment is entitled to enforce the mortgage for his own indemnity, and any act of the assignee which operates to deprive him of that indemnity discharges him. *Id.*

4. The assignment also contained a covenant that the assigned mortgage was the first lien upon the mortgaged premises. *Held*, that proof of knowledge on the part of the assignors of the existence of the other mortgage was not sufficient to sustain a finding of fraud. *Id.*

— *When order and acceptance amounts to equitable assignment of claim under a building contract and as payment upon the contract.*

See Gibson v. Lenans. 183

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. The provision of the act in relation to assignments for the benefit of creditors (Subd. 3, § 3, chap. 466, Laws of 1877), requiring that the inventory of a debtor making an assignment shall state the sum owing to each creditor "with the true cause and consideration therefor" does not require, where the indebtedness consists of promissory notes, that the inventory should state what they were given for. A statement, as to each note, of its date, time of payment, payee, to whom belonging, and the amount due thereon is sufficient. *Pratt v. Stevens.* 387

2. Where an assignor has knowledge that a security which has been given by him to a creditor, for instance a chattel mortgage, is fraudulent and void as to creditors, he is not bound to state the same in his inventory by the provision of said statute (Subd. 3, § 3), requiring the inventory to contain "a full statement of any existing security for the payment" of a debt owing by the assignor: the provision applies simply to valid securities. *Id.*

3. Where an affidavit of the assignor to the inventory, after stating, as required by the statute (Subd. 5, § 3, as amended by § 1, chap. 818, Laws of 1878), that the same was "in all respects just and true," added "to deponent's best knowledge, information and belief," *held*, that there was a substantial compliance with the statute; that it was not essential that the matter sworn to should be wholly within the actual knowledge of the debtor; and that the added words did not modify or detract from those preceding them. *Id.*

4. When the county judge is absent from the county a delivery of the inventory to his clerk, at the office of the county judge, is a substantial compliance with the provision of said act (§ 3), requiring such inventory to be delivered to the county judge of the county where the assignment is recorded. *Id.*

5. So, also, a delivery of the inventory to the county judge of an adjoining county, who at the time is holding court in the county, is sufficient, as under the act of 1877 (Chap. 11, Laws of 1877) such county judge is clothed with all of the powers, and may perform all of the duties of the county judge of the county. *Id.*

6. As to whether the provision of said General Assignment Act (§ 3, subd. 5), declaring that, in case of failure to file an inventory as prescribed, the assignment will be void, was to be considered as a penalty; and as to whether the amendatory provision of the act of 1878 (Chap. 818, Laws of 1878), declaring that the failure to file the inventory as required shall not invalidate the assignment, and conferring upon the county judge the power to order an inventory to be amended or corrected, is to be considered as a repeal of the penalty, and so as taking away all right to have an assignment executed before the passage of the amendatory act declared void because of failure to file the inventory, *quære*. *Id.*

ATTACHMENT.

1. The C. W. R. R. Co., a Connecticut corporation, in pursuance of the laws of that State, to secure certain bonds issued by it, executed to the State treasurer a mortgage, which, by its terms, covered all the railway lands and personal property then or thereafter belonging to said corporation, and all its rights and franchises under its charter. Default having occurred in payment of interest as provided for by the bonds, the corporation formally surrendered its property to plaintiff as such trustee. Defendant, as sheriff, by virtue of an attachment issued in an action brought in this State against said corporation, levied upon certain of its personal property found here. In an action to recover possession thereof, *held*, that the bonds having been issued by the State comptroller as required by the law of Connecticut, and being valid upon their face, plaintiff was not bound to show that the provisions of law authorizing their issue had been complied with, but the burden was upon defendant to show their invalidity; also that if any of the conditions precedent to taking of possession had not been complied with, these had been waived by the corporation by voluntarily surrendering possession; and that defendant could not insist upon them. *Nichols v. Mass.* 160

2. Said corporation held a lease of part of the road of another railroad company in this State; this was in the possession of defendant, and was replevied. *Held*, that plaintiff was not entitled to recover the same in this action; that a lease of itself was not the subject of replevin. *Id.*

3. The provision of the Code of Civil Procedure (Subd. 3, § 708), declaring that a person who willfully conceals or withholds from the sheriff property which he has attached, but which has passed out of his hands, shall be liable to double damages "at the suit of the party aggrieved," gives to the at-

tachment and execution creditor a right of action when aggrieved.
Scott v. Morgan. 508

4. As, however, the remedy thus given exists solely by force of the statute, it must be confined to the cases provided for, and can be resorted to only where injury has been occasioned to the creditor by such willful withholding and concealment. Such an injury can only be shown by a return of the process unsatisfied. *Id.*

5. The right of action also does not exist save where property has been once taken in execution by the sheriff, has passed out of his hands and he is unable to regain possession, and dispose of it under the authority conferred by the execution. *Id.*

6. Where possession is regained, the statute does not give a remedy for an injury to the property while in possession of the wrong-doer. *Id.*

7. It must appear also that the concealment and withholding was willful. One who dispossesses the sheriff under a claim of right, and detains the property under a belief that he has a superior title thereto, may not be made liable. *Id.*

8. Where, therefore, the complaint in such an action failed to allege that the taking of the property by the defendant was willful, and plaintiff's counsel admitted in his opening on the trial that defendant acted as tax collector and by virtue of a levy under a tax warrant, by which he claimed to have acquired a right superior to that of the sheriff, and it also appeared from the complaint and the opening that after the alleged trespass by defendant, the sheriff regained possession and sold the property under his process; *held*, that the complaint was properly dismissed. *Id.*

ATTORNEY AND CLIENT.

1. Plaintiffs agreed to prosecute two actions for defendant for a specified

sum as retaining fee, an allowance for each day's attendance before a referee, and a percentage of any recoveries. Because of non-payment of the retaining fee, and the daily allowance, plaintiffs, as the referee found, "refused to be bound by the contract," but they continued thereafter as attorneys of record and acted in that relation, and as such, without the knowledge of their client and in hostility to his interests stipulated to vacate an order in his favor, granted in one of said actions. *Held*, that plaintiffs' contract was an entire one; that conceding because of the non-payment of fees, they might refuse to act they could waive the default, and having so done, by acting as attorneys thereafter, and their action being wrongful and adverse to their client, they were not entitled to compensation for any services in said suit. *Andrews v. Tyng.* 16

2. Before plaintiffs' refusal to be bound a judgment against defendant had been rendered in the other of said actions. *Held*, that plaintiffs could only recover under and according to the terms of the contract. *Id.*

3. *It seems* that the issuing of an execution against the person of a judgment debtor is within the scope of the implied authority of the attorney for the judgment creditor; and when such an execution is issued and the debtor arrested thereon in a case where it is not authorized, the client may be held liable, although there be no evidence that he directed either the issuing of the execution or the arrest. *Guillaume v. Rows.* 268

BANKS AND BANKING.

1. A cashier of a bank has, as incident to his office, implied authority to borrow money for it, and, in the absence of any statutory restraint, to secure the loan by pledge of its property or funds; and, as against third persons, the

assumption of such authority by the cashier will conclude the bank.
Coats v. Donnell. 168

2. An oral agreement was made in the city of New York, June 10, 1878, between M., the cashier of the M. Bank, of Kansas City, and the firm of D. L. & Co., the correspondents in New York of said bank, to the effect that if said firm would accept certain drafts, amounting to \$35,000, which had been previously drawn upon it for the accommodation of and negotiated by the bank, the latter would keep on deposit with the firm at all times until maturity of the drafts, a balance equal to the amount thereof, and that the drawees should have a lien on such balance as security, with the right to charge the account at any time with the acceptances, and appropriate to their payment so much of the deposits as should be necessary. D. L. & Co. were advised by the cashier that the bank was embarrassed, but that, with the assistance so obtained and other aid, it would be able to continue business. They accepted the drafts under the agreement, and the proceeds were shortly after deposited with them by the bank, and other deposits were made by it. Sight drafts were subsequently drawn by the bank, on D. L. & Co. in the ordinary course of business, and all presented prior to August 8, 1878, were paid. On July 27 said cashier wrote to D. L. & Co. that he apprehended a run on the bank, and directed them to charge up the acceptances; the letter was received July 30, but not then acted upon. On August 8, the firm received a telegram from the cashier, announcing the failure of the bank. At that time the balance of the deposit account in favor of the bank was more than enough to pay the acceptances; these were immediately charged up to the bank. On the same day, but later, the bank made an assignment to plaintiff for the benefit of creditors. D. L. & Co. paid the drafts when they matured. At the time of the assignment there were outstanding unaccepted drafts drawn by the bank

on D. L. & Co., amounting to about \$40,000. In an action to recover the sum so appropriated by D. L. & Co. to meet the drafts, *held*, that the agreement was one the cashier had authority to make, both under his general authority, and by virtue of a by-law of the bank which gave him the charge and supervision of the bank, with power to make loans etc.; that the agreement was not invalid as against public policy; and that it, with the subsequent transactions, was effectual to create a lien on the deposit, and authorized the appropriation. *Id.*

3. Also *held*, that the agreement was not fraudulent as to the holders of the drafts drawn on D. L. & Co. after it was made. *Id.*
4. The accepted drafts were without interest, and at the time of the appropriation their present value was \$34,833. *Held*, that the right of the firm was not limited to this amount; but that they had the right to charge against the account the face of the drafts and hold that amount to meet them when due. *Id.*

BANKRUPTCY.

1. Plaintiff was appointed receiver under a judgment in favor of a bank. *Held*, the fact that the bank had ceased to be a corporation by reason of the appointment of a receiver in bankruptcy of its assets did not invalidate plaintiff's appointment; that it was competent for the receiver of the bank to institute proceedings in its name, to collect the judgment and to procure or sanction the appointment of a receiver of the assets of the judgment debtor. *Wright v. Nostrand.* 81
2. The plaintiffs, in whose favor the judgment upon which the supplementary proceedings were based was rendered, composed the firm of P. & Co.; three of the four members of the firm had become insolvent, and assignees in bank-

ruptcy of their assets had been appointed. *Held*, that said assignees were not authorized to take the firm property, and so their appointment had no effect upon the ownership of the judgment. *Id.*

3. The provision of the Revised Statutes, declaring a grant of land void if at the time of delivery thereof the land shall be in the actual possession of one claiming under a title adverse to that of the grantor, does not apply to a deed from an assignee in bankruptcy, made in pursuance of an order of the bankruptcy court. *Coleman v. M. B. Imp. Co. (Limited).* 229

4. Plaintiff claimed title under a deed executed to him in 1880, by an assignee in bankruptcy of one who took title from the grantee in a deed executed in 1855. The assignee executed the deed under an order of the bankruptcy court, made upon petition of the bankrupt, showing that plaintiff purchased of him, and paid for the lands in question, together with other lands in 1856, and that by mistake they were omitted from the deed; the assignee's deed recited that it was made to correct such mistake. At the time of the delivery of the assignee's deed, defendant was in possession, claiming under a deed executed in 1877 by the grantors in the deed of 1855. *Held*, that the bankruptcy court had power to give the relief granted by its order, in the absence of any objection by the parties in interest; and that the deed was not void as champertous. *Id.*

BENEVOLENT, ETC., ASSOCIATIONS.

1. In 1878 L., plaintiff's testator, became a member of the corporation defendant. By its by-laws, in force at the time, it was provided that upon the death of a member, "the sum of one thousand dollars, collected by contributions from all the lodges in this district, shall be paid to the wife of the deceased, if living, and, if dead, to his children,

and, if there are none, then to such person as he may have formally designated to his said lodge prior to his decease," said sum to be collected by assessments upon the lodges in the district. The testator, having no wife or children, designated his mother as the beneficiary. The designation described the payment directed as "the \$1,000 my heirs are to receive." The mother died before the testator, and no other designation in the manner specified was made. In an action to recover said sum, *held*, that the testator had no interest in the fund which could descend, or upon which a will could operate, but simply a power of appointment which, if not exercised prior to his death, in the manner specified became inoperative; and that, as the beneficiary named died before him, and no other designation was made as prescribed, defendant was not bound to pay to any one; that the reference to "heirs" in the designation could not be interpreted as making them the recipients, but was only matter of description. *Hellenberg v. Dist. No. 1, I. O. B. B.* 580

2. The will of L. bequeathed the sum in question to his mother or, in the event of her death, to his brother. This was in no manner brought to defendant's knowledge until after the testator's death. *Held*, that this did not operate as a new designation. *Id.*

BILLS, NOTES AND CHECKS.

1. An oral agreement was made in the city of New York, June 10, 1878, between M., the cashier of the M. Bank, of Kansas City, and the firm of D. L. & Co., the correspondents in New York of said bank, to the effect that if said firm would accept certain drafts, amounting to \$35,000, which had been previously drawn upon it for the accommodation of and negotiated by the bank, the latter would keep on deposit with the firm at all times until maturity of the drafts, a balance equal to the amount thereof, and that the

drawees should have a lien on such balance as security, with the right to charge the account at any time with the acceptances, and appropriate to their payment so much of the deposits as should be necessary. D. L. & Co. were advised by the cashier that the bank was embarrassed, but that, with the assistance so obtained and other aid, it would be able to continue business. They accepted the drafts under the agreement, and the proceeds were shortly after deposited with them by the bank, and other deposits were made by it. Sight drafts were subsequently drawn by the bank, on D. L. & Co. in the ordinary course of business, and all presented prior to August 8, 1878, were paid. On July 27 said cashier wrote to D. L. & Co. that he apprehended a run on the bank, and directed them to charge up the acceptances; the letter was received July 30, but not then acted upon. On August 8, the firm received a telegram from the cashier, announcing the failure of the bank. At that time the balance of the deposit account in favor of the bank was more than enough to pay the acceptances; these were immediately charged up to the bank. On the same day, but later, the bank made an assignment to plaintiff for the benefit of creditors. D. L. & Co. paid the drafts when they matured. At the time of the assignment there were outstanding unaccepted drafts drawn by the bank on D. L. & Co., amounting to about \$40,000. In an action to recover the sum so appropriated by D. L. & Co. to meet the drafts, *held*, that the agreement was one the cashier had authority to make, both under his general authority, and by virtue of a by-law of the bank which gave him the charge and supervision of the bank, with power to make loans, etc.; that the agreement was not invalid as against public policy; and that it, with the subsequent transactions, was effectual to create a lien on the deposit, and authorized the appropriation. *Coats v. Donnell*. 168

2. Also *held*, that the agreement was not fraudulent as to the holders of

the drafts drawn on D. L. & Co. after it was made. *Id.*

3. The accepted drafts were without interest, and at the time of the appropriation, their present value was \$34,833. *Held*, that the right of the firm was not limited to this amount; but that they had the right to charge against the account the face of the drafts and hold that amount to meet them when due. *Id.*
4. Where an action was brought against the maker, upon a promissory note more than twenty years after the same fell due, *held*, that although the statute of limitation was not a bar because of non-residence of defendant, yet that the lapse of time raised a presumption of payment. *Bean v. Tonnelo*. 581
5. It appeared that defendant executed the note for the accommodation of the payee, who indorsed the same to plaintiff; that said payee was dead, but that for a period of seventeen years after the note fell due he was within the jurisdiction of the court. Defendant then offered to show that plaintiff was in indigent circumstances during this period; this was objected to and excluded. *Held* error; that the evidence was proper as tending to fortify the presumption of payment or satisfaction. *Id.*
6. Also *held*, that the error was not cured, or the objection waived, by the rejection, upon defendant's objection, of evidence offered by plaintiff, tending to explain the delay in bringing suit. *Id.*

BONA FIDE HOLDER.

1. H. M. Cutter & Co., cotton brokers, falsely and fraudulently represented to plaintiffs that they had orders from the F. M. Co. to purchase for it one hundred bales of cotton, and relying thereon, plaintiffs contracted to sell that quantity to the corporation named. Bought and sold notes in the usual form were delivered by plaintiff's brokers, in which the sale was stated

to have been made to said corporation. The notes contained the following: "Payment guaranteed by H. M. Cutter & Co. Bill to H. M. Cutter & Co." No bill, warehouse receipt or other muniment of title was in fact delivered to Cutter & Co. The cotton was delivered to that firm to be delivered to the supposed purchaser; they placed it in a warehouse, obtained advances upon the warehouse receipts, and it was subsequently sold to *bona fide* purchasers. In an action to recover possession of a portion of the cotton, *held*, that the transaction, by means of which Cutter & Co. obtained possession, was a larceny; that the words "Bill to H. M. Cutter & Co." amounted merely to a *memorandum*, and taken with the rest of the contract imported that when the bill was made out to the purchaser named, it was to be sent to Cutter & Co.: and that as plaintiffs had delivered to that firm no symbol of property, or indicium of title giving an appearance of ownership, they were not estopped from asserting their title and were entitled to recover. *Hentz v. Miller.* 64

2. As against a purchaser in good faith and for value of a mortgage upon land, executed by one in possession of and holding the legal title to the land, the grantor of the mortgagor is estopped from claiming that the conveyance was induced by fraud on the part of the latter. *Simpson v. Del Hoyo.* 189
3. Although the mortgage may have been assigned successively to several participants in the fraud or *mala fide* purchasers, having reached the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded grantor are cut off. *Id.*
4. The rule that the purchaser of a non-negotiable chose in action takes it subject to all the equities existing between the original parties, and to all the latent equities of third persons does not apply. *Id.*
5. In such a case, however, the fraud being established, the burden is

upon the holder of the mortgage, of proving both that he purchased for value and in good faith. *Id.*

BONDS.

—When in case of bonds issued by a railroad corporation of another State which are valid on their face, it is to be presumed that the provisions of law authorizing their issue have been complied with.

See Nichols v. Mass.

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BRIDGES:

1. The provisions of the Revised Statutes relating to town line roads (1 R. S. 516, §§ 73, 74, 75) do not provide for the maintenance of bridges, and the road districts therein mentioned do not include bridges; they simply refer to ordinary road districts, and were intended to provide only for ordinary highway labor. *Day v. Day.* 153
2. A bridge, therefore, upon a town line road which is located partly in each of the towns is not to be considered as wholly within the town to which the road district including it has been allotted under said provisions; but the towns are jointly liable for the expense of maintaining it. *Id.*
3. The commissioner of highways of one of the towns so liable may waive the twenty days written notice required to be given by the act providing for the maintenance of such bridges (§ 1, chap. 225, Laws of 1841, as amended by chap. 383, Laws of 1857); and where, upon application of the commissioner of the other town, he absolutely refuses to help rebuild the bridge, when it becomes necessary, he thereby waives notice, and the latter may rebuild and then maintain an action against the former to recover half the expense. *Id.*

BURDEN OF PROOF.

1. Defendant B. purchased certain securities under an agreement be-

tween him and plaintiff that the purchase should be made by B. on joint account, each to furnish half of the purchase-money. Plaintiff placed in the hands of B. sufficient funds to pay for his half. At the time of the agreement the amount of the securities and the price were not known. In an action for an accounting, *held*, that B. became the agent of plaintiff as to the half interest of the latter, and a quasi trustee of the money placed in his hands, and of the property purchased; that the plaintiff had the right to call B. to account in equity, and the burden was upon the latter of showing both the price paid and what property was purchased. *Marvin v. Brooks.* 71

2. As against a purchaser in good faith and for value of a mortgage upon land, executed by one in possession of and holding the legal title to the land, the grantor of the mortgage is estopped from claiming that the conveyance was induced by fraud on the part of the latter. In such a case, however, the fraud being established, the burden is upon the holder of the mortgage, of proving both that he purchased for value and in good faith. *Simpson v. Del Hoyo.* 189

—When, in case of bonds issued by a foreign corporation, which are valid on their face, it is to be presumed that the provisions of law authorizing their issue has been complied with, and the burden is upon one assailing them to show the contrary.

See Nichols v. Mass. 160

CASES REVERSED, DISTINGUISHED, ETC.

- Vance v. Throckmorton* (5 Bush, 41), distinguished. *Hancock v. Rand.* 10
- Manning v. Wells* (9 Humph. 746), distinguished. *Hancock v. Rand.* 10
- Hursh v. Byers* (29 Mo. 469), distinguished. *Hancock v. Rand.* 10

Pollock v. Landis (36 Iowa, 651), distinguished. *Hancock v. Rand.* 10

Lusk v. Belote (22 Minn. 468), distinguished. *Hancock v. Rand.* 10

Byrne v. N. Y. C. & H. R. R. R. Co. (28 Hun, 488), reversed. *Byrne v. N. Y. C. & H. R. R. R. Co.* 13

Saulsbury v. Village of Ithaca (24 Hun, 12), reversed. *Saulsbury v. Village of Ithaca.* 27

Rockwell v. Merwin (45 N. Y. 166), distinguished. *Wright v. Nostrand.* 46

Dubois v. Cassidy (75 N. Y. 298), distinguished. *Wright v. Nostrand.* 46

Sackett v. Newton (10 How. Pr. 561), distinguished. *Wright v. Nostrand.* 46

Shipman v. Burrows (1 Hall, 442), distinguished. *Bergmann v. Jones.* 58

Hallock v. Miller (2 Barb. 630), distinguished. *Bergmann v. Jones.* 59

Tobins v. Harland (4 Wend. 537), distinguished. *Bergmann v. Jones.* 59

Linden v. Graham (1 Duer, 670), distinguished. *Bergmann v. Jones.* 59

Patterson v. Birdsall (64 N. Y. 294), distinguished. *Baldwin v. Moffett.* 85

Loomis v. People (67 N. Y. 322), distinguished. *Thorne v. Turck.* 59

Seward v. Huntington (26 Hun, 217), reversed. *Seward v. Huntington.* 104

Lawrence v. Fox (20 Hun, 268), distinguished. *Seward v. Huntington.* 118

Burr v. Beers (24 N. Y. 178), distinguished. *Seward v. Huntington.* 118

- Ormes v. Dauchy* (82 N. Y. 443), distinguished. *People v. Noelke*. 142
- Van Voorhis v. Brintnall* (86 N. Y. 18), distinguished. *People v. Noelke*. 142
- People v. Crapo* (76 N. Y. 288), distinguished. *People v. Noelke*. 144
- People v. Brown* (72 N. Y. 571), distinguished. *People v. Noelke*. 144
- Ryan v. People* (79 N. Y. 594), distinguished. *People v. Noelke*. 144
- Whitford v. Laidler* (25 Hun, 136), reversed. *Whitford v. Laidler*. 145
- Kiersted v. O. & A. R. R. Co.* (60 N. Y. 345), distinguished. *Whitford v. Laidler*. 149
- Briggs v. Partridge* (64 N. Y. 357), distinguished. *Whitford v. Laidler*. 149
- Taft v. Brewster* (9 Johns. 384), distinguished. *Whitford v. Laidler*. 149
- Stone v. Wood* (7 Cow. 453), distinguished. *Whitford v. Laidler*. 149
- Guyon v. Lewis* (7 Wend. 26), distinguished. *Whitford v. Laidler*. 149
- Honegger v. Wettstein* (15 J. & S. 125), reversed. *Honegger v. Wettstein*. 252
- Isaacson v. N. Y. C. & H. R. R. Co.* (25 Hun, 350), reversed. *Isaacson v. N. Y. C. & H. R. R. Co.* 278
- Berger v. Carman* (79 N. Y. 146), distinguished. *In re N. Y., W. S. & B. S. R. Co.* 291
- Beers v. Shannon* (73 N. Y. 292), distinguished. *Bennett v. Whitney*. 306
- Hollenbeck v. Donnell* (29 Hun, 94), reversed. *Hollenbeck v. Donnell*. 342
- Devlin v. Smith* (89 N. Y. 470), distinguished. *Vosburgh v. L. S. & M. S. R. Co.* 378
- Pratt v. Stevens* (26 Hun, 229), reversed. *Pratt v. Stevens*. 387
- Burkitt v. Harper* (79 N. Y. 273), distinguished. *Cornell v. Barney*. 400
- Otis v. Dodd* (90 N. Y. 836), distinguished. *Cornell v. Barney*. 400
- People, ex rel. Sims, v. Bd. Fire Com'rs* (73 N. Y. 440), distinguished. *People, ex rel. Keech, v. Thompson*. 463
- People, ex rel. Munday, v. Bd. Fire Com'rs* (72 N. Y. 247), distinguished. *People, ex rel. Keech, v. Thompson*. 463
- People, ex rel. Campbell, v. Campbell* (82 N. Y. 445), distinguished. *People, ex rel. Keech, v. Thompson*. 464
- People, ex rel. Mayor etc., v. Nichols* (79 N. Y. 588), distinguished. *People, ex rel. Keech, v. Thompson*. 464
- Peck v. Valentine* (29 Hun, 668), reversed. *Peck v. Valentine*. 569
- Cath. M. B. Ass'n. v. Priest* (46 Mich. 439), distinguished. *Hollenberg v. Dist. No. 1, I. O. B. B.* 587
- Ex. Aid Society v. Lewis* (9 Mo. App. 412), distinguished. *Hollenberg v. Dist. No. 1, I. O. B. B.* 587
- Erdman v. Mut. Ins. Co., etc.* (44 Wis. 376), distinguished. *Hollenberg v. Dist. No. 1, I. O. B. B.* 587
- Roswell v. Eq. Aid Union* (18 Fed. Rep. 840), distinguished. *Hollenberg v. Dist. No. 1, I. O. B. B.* 587
- Lewis v. Smith* (9 N. Y. 502), distinguished. *In re Zahrt*. 609
- Penfield v. Goodrich* (10 Hun, 41), overruled in part. *Murray v. Marshall*. 614

CASE.

1. An appellant is simply bound to present his case to the General Term upon the case as settled, and to this court upon the same record ;

he is not bound to print matter proposed by the respondent as an amendment to the case but disallowed by the trial judge. *Kilmer v. N. Y. C. & H. R. R.* 495

2. Plaintiff, the appellant herein, in his proposed case set forth portions of certain tariffs and schedules, prepared and issued by defendant, which were exhibits on trial; the portions omitted were not referred to on the trial, and in the opinion of the trial judge were not material. Defendant proposed as an amendment that the whole of the exhibits should be inserted. Said judge in settling the case disallowed the amendment, but required plaintiff to paste the exhibits in the appeal-book, if copies were furnished by defendant, or in lieu thereof that the original exhibits might be referred to on the argument. Defendant furnished the copies. On motion by defendant that plaintiff be required to print the exhibits as part of the return to this court plaintiff offered to attach copies to the appeal-book, if furnished by defendant. *Held*, that he should not be required to do more; that the order of the trial judge held good until the final determination of the action. *Id.*

3. *It seems* that such a practice is not to be encouraged, but as the permission to bring in the exhibits was in favor of respondent he could not complain. *Id.*

4. It is not the object of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court, and they cannot therefore be properly referred to to ascertain the grounds of decision. *Scott v. Morgan.* 508

5. Where, therefore, a case as settled stated the grounds upon which a motion to dismiss the complaint was made and granted, *held*, that this was controlling, and respondent could not refer to the minutes, although incorporated in the record, to show that the motion was

also based upon other grounds than those stated in the case. *Id.*

6. But *held*, that respondent had the right, in support of the judgment, to urge any sufficient ground appearing from the record which he might have raised in the court below, provided it could not have been obviated had it been raised on the trial. *Id.*

CAUSE OF ACTION.

1. *It seems* that it is competent for a receiver, appointed in supplementary proceedings, to bring an action either to set aside and annul alleged fraudulent conveyances of his real estate by the debtor, and for a reconveyance of the property by the fraudulent grantee, or to set aside the conveyances as a cloud on title so as to subject the property to levy and sale on execution. *Wright v. Nostrand.* 81

2. Where a trustee has purchased for himself and has received a conveyance of real estate, a part of the trust property, the *cestui que trust* may maintain an action to compel a conveyance to him, or in trust for him by the trustees, and it is no objection to the granting of the relief sought that the defect in his title appears upon the records. *Dodge v. Stevens.* 209

3. Where, after having received a conveyance, the trustee executed a mortgage upon the real estate to one having full notice of the rights of the *cestui que trust*, *held*, that the mortgagee might be joined with the trustee as party defendant for the purpose of affording complete relief, and freeing the title from embarrassment by setting aside the mortgage. *Id.*

4. A devisee who claims a mere legal estate in the real property of the testator, when there is no trust, cannot maintain an action for the construction of the devise, but must assert his title by a legal action, or, if in possession, must await an attack upon it and set up

the devise in answer to the hostile claim. *Weed v. Weed.* 243

5. Where premises have been conveyed absolutely to secure a loan, and because of a refusal on the part of the lender to reconvey on tender of the amount due, the borrower brings an action to compel a reconveyance, he cannot, after judgment in his favor in such an action, maintain another action to recover, as damages, the amount of a depreciation in the value of the property pending the litigation, or his costs and expenses in the equity suit; conceding an action to recover damages may be maintained, as to which *quære*, these are not proper items of damages. *Murvin v. Prentice.* 295

6. Plaintiff's father died intestate; his mother was appointed administratrix and also general guardian for the infant children, five in number. A settlement of the accounts of said administratrix was had and a final decree entered by the surrogate fixing the shares of the infants; subsequently two of them died intestate. Defendant was the attorney, counsel and proctor for the widow, and as such received moneys belonging to the estate. Upon an accounting he gave to the widow a written acknowledgment stating that there was due to her, as guardian for the three surviving children, the sum of \$1,500, payable according to the surrogate's decree, interest thereon to be paid semi-annually. Subsequently the widow died, and K. was appointed by the surrogate general guardian of the plaintiff, who, being still an infant, brings this action by said K. as his guardian *ad litem*, duly appointed for that purpose, to recover his share. *Held*, that the action was well brought, and that a good cause of action was shown for \$500: that the acknowledgment was an admission that the money belonged to plaintiff and had been held by his general guardian in trust for him; and, even if not originally collected and received by defendant for plaintiff, but paid over to him by said guardian, as he had knowledge

that it was a trust fund, he received it impressed with the same trust, and plaintiff's share therein having been ascertained and agreed upon, he could follow the fund and maintain an action for his share. *Segelken v. Meyer.* 473

7. The acknowledgment also stated that defendant was indebted to the widow as next of kin of the two deceased children in the sum of \$1,000. It was admitted that this sum was due the widow and the three surviving children as next of kin, she in her own right and as guardian for them being entitled to receive it; it also appeared that defendant had promised plaintiff's attorney to pay his share, and raised no objection because of the non-appointment of an administrator. *Held*, that in the absence of proof that administration upon the estates of the deceased children had been granted, plaintiff was entitled to recover in this action his share (one-fourth) of said sum. *Id.*

8. The provision of the Code of Civil Procedure (Subd. 3, § 708), declaring that a person who willfully conceals or withholds from the sheriff property which he has attached, but which has passed out of his hands, shall be liable to double damages "at the suit of the party aggrieved," gives to the attachment and execution creditor a right of action when aggrieved. *Scott v. Morgan.* 508

9. As, however, the remedy thus given exists solely by force of the statute, it must be confined to the cases provided for, and can be resorted to only where injury has been occasioned to the creditor by such willful withholding and concealment. Such an injury can only be shown by a return of the process unsatisfied. *Id.*

10. The right of action also does not exist save where property has been once taken in execution by the sheriff, has passed out of his hands and he is unable to regain possession, and dispose of it under the authority conferred by the execution. *Id.*

11. Where possession is regained, the statute does not give a remedy for an injury to the property while in possession of the wrong-doer. *Id.*

12. It must appear also that the concealment and withholding was willful. One who dispossesses the sheriff under a claim of right, and detains the property under a belief that he has a superior title thereto, may not be made liable. *Id.*

13. Where, therefore, the complaint in such an action failed to allege that the taking of the property by the defendant was willful, and plaintiff's counsel admitted in his opening on the trial that defendant acted as tax collector and by virtue of a levy under a tax warrant, by which he claimed to have acquired a right superior to that of the sheriff, and it also appeared from the complaint and the opening that after the alleged trespass by defendant, the sheriff regained possession and sold the property under his process, *held*, that the complaint was properly dismissed. *Id.*

14. The complaint, in an action under the Code of Civil Procedure (§ 1861) to establish a will, alleged, in substance, that the testator, an inhabitant of, and domiciled in the county of R., in this State, and possessed of personal property therein, but temporarily residing in Spain, duly signed, published, declared and executed the instrument in question before a notary, that it remains on file in the office of the notary, from which, by reason of the laws of Spain, it cannot be taken, and that plaintiff is a legatee under the will. *Held*, that a case was made out authorizing the action. *Younger v. Druffe*.

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CHAMPERTY.

1. The provision of the Revised Statutes, declaring a grant of land void if at the time of delivery thereof the land shall be in the actual possession of one claiming under a title adverse to that of the

grantor, does not apply to a deed from an assignee in bankruptcy, made in pursuance of an order of the bankruptcy court. *Coleman v. M. B. Imp. Co. (Limited)*. 229

2. In an action of ejectment, it appeared that the premises in question were, in 1824, in the possession of a tenant who held under a lease from W., dated in 1823, and running for twenty years. In order to get possession, R. T., who had or claimed a title under a deed from B., employed I. to purchase the lease, which he did with the money of R. T., taking an assignment, however, in his own name. By collusion with I., and without the knowledge of the landlord, R. T. entered into possession, asserting title under the deed from B. The lease, however, was found in his possession, and he made several efforts to buy the W. title. Plaintiff claimed under deeds from the heirs of W. to C., executed in 1858 and 1859. The premises were then in the possession of grantees of G. F. T., who entered under a deed in 1846. It was admitted by defendants that R. T. "and the grantees under him have been in possession * * * and that defendant is now in possession under that (R. T.'s) claim of title." The trial court refused to submit to the jury the question as to the character of R. T.'s entry into possession, and nonsuited plaintiff. *Held* error; that if R. T., when he entered in 1824, became the tenant of W., his possession and that of his grantees remained the possession of his landlord not only until the end of the term, but presumably for twenty years thereafter, *i. e.* until 1863, and so there was no adverse possession at the time of the conveyance to C. making his deed void for champerty; and that, therefore, the question as to the character of R. T.'s possession should have been submitted to the jury. *Whiting v. Edmunds*. 309

3. C. deeded to G. F. T. in 1869, the latter executing a mortgage back. At that time the title under the deed of 1846 to G. F. T. was in

his wife. The mortgage was assigned to plaintiff, who foreclosed the same in 1870, making the wife a party; he became the purchaser and received a referee's deed in 1874. It was claimed by defendants that the deed from C. was void for champerty. *Held*, the surrounding facts left it possible that G. F. T. was in actual possession when C.'s deed to him was given, and that he took the deed and gave back the mortgage with the knowledge and assent of his wife; and so, it could not be said, as matter of law, that said deed was void. *Id.*

4. As to whether, conceding the deed to have been void, C.'s title did not pass to the plaintiff by estoppel, *quære*. *Id.*

CHATTEL MORTGAGE.

1. The C. W. R. Co., a Connecticut corporation, in pursuance of the laws of that State, to secure certain bonds issued by it, executed to the State treasurer a mortgage, which, by its terms, covered all the railway lands and personal property then or thereafter belonging to said corporation, and all its rights and franchises under its charter. Default having occurred in payment of interest as provided for by the bonds, the corporation formally surrendered its property to plaintiff as such trustee. Defendant, as sheriff, by virtue of an attachment issued in an action brought in this State against said corporation, levied upon certain of its personal property found here. In an action to recover possession thereof, *held*, that the bonds having been issued by the State comptroller as required by the law of Connecticut, and being valid upon their face, plaintiff was not bound to show that the provisions of law authorizing their issue had been complied with, but the burden was upon defendant to show their invalidity; also that if any of the conditions precedent to taking of possession had not been complied with, these had been waived by the corporation by voluntarily sur-

rendering possession; and that defendant could not insist upon them. *Nichols v. Mase*. 160

2. *Held*, in the absence of proof, it could not be assumed that the property in question was acquired by the corporation after the execution of the mortgage. *Id.*
3. *It seems* that if it had been so acquired it was covered by the mortgage. *Id.*
4. Also *held*, that the fact that the mortgage was not filed as required by the statutes of this State in reference to chattel mortgages (Chap. 279, Laws of 1833), or recorded as a mortgage of real estate as provided in reference to railroad mortgages (Chap. 779, Laws of 1868), did not affect its validity; that its validity was to be determined by the laws of Connecticut. *Id.*
5. Also *held*, in the absence of proof to the contrary, it was to be assumed that the property in question was in Connecticut at the time of the execution of the mortgage, and the mortgage being valid under the laws of that State, it was valid and enforceable here. *Id.*
6. *It seems* that under the laws of Connecticut witnesses are not necessary to a mortgage executed by a corporation. *Id.*
7. Money was loaned to a corporation in 1874 under an agreement with it that payment should be secured by chattel mortgage. A mortgage was accordingly executed by the president and secretary of the corporation, with the actual assent of the stockholders, but without the filing of a written assent in the county clerk's office as required by the act of 1871 (Chap. 431, Laws of 1871). In 1879, the debt remaining unpaid, the formal assent of the stockholders was given and filed as required by said act and the act of 1878 (Chap. 163, Laws of 1878), and a new mortgage was executed in lieu of the former one, and in pursuance and fulfillment of the original agreement. At this

time the corporation was insolvent. *Held*, the evidence did not authorize a finding that the mortgage was given in contravention of the statute. *Pculding v. Chrome Steel Co.* 384

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

— *A lease is not the subject of replevin.*
See *Nichols v. Mase.* 160

CLERKS.

1. It is not the object of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court, and they cannot, therefore, be properly referred to to ascertain the grounds of decision. *Scott v. Morgan.* 508
2. Where, therefore, a case as settled stated the grounds upon which a motion to dismiss the complaint was made and granted, *held*, that this was controlling, and respondent could not refer to the minutes, although incorporated in the record, to show that the motion was also based upon other grounds than those stated in the case. *Id.*

CLOUD ON TITLE.

1. Where a trustee has purchased for himself real estate, belonging to the trust property, and the title has been vested in the trustee by a conveyance, the *cestui que trust* may maintain an action to compel a conveyance to him, or in trust for him by the trustees, and it is no defense on the part of the latter to the relief sought that the defect in his title appears upon the records. *Dodge v. Stevens.* 209.
2. Where, after having received a conveyance, the trustee has executed a mortgage upon the real estate to one having full notice of the rights of the *cestui que trust*, the mortgagee may be joined with the trustee as party defendant for the purpose of affording complete

relief, and freeing the title from embarrassment by setting aside the mortgage. *Id.*

CODE OF PROCEDURE.

§ 244, Sub. 5, *Hollenbeck v. Donnell.* 342

CODE OF CIVIL PROCEDURE.

§ 4, *Hollenbeck v. Donnell.* 342
 §§ 190, 191 { *Raynor v. Raynor.* 248
 { *Rogers v. Sandy Hill. (Mem.)* 638
 § 373, *Whiting v. Edmunds.* 309
 §§ 390, 414, *Clark v. L. S. & M. S. R. R. Co.* 217
 468, *Segelken v. Meyer.* 473
 522, *Dunham v. Cudlipp.* 629
 526, *In re Macaulay.* 574
 549, *Humphrey v. Hayes.* 594
 550, *Segelken v. Meyer.* 473
 708, *Scott v. Morgan.* 508
 713, *Hollenbeck v. Donnell.* 342
 756, *Smith v. Zalinski.* 519
 997, 1001, *Raynor v. Raynor.* 248
 1336, 1350, *Raynor v. Raynor.* 248
 1487, *Segelken v. Meyer.* 473
 1861, *Younger v. Duffie.* 535
 2525, 2534, 2536, *In re Macaulay.* 574
 2717, 2723, *In re Macaulay.* 574
 2793, *In re Zahrt.* 605
 2803, 2804, 2805, *In re McCarter.* 558

CODE OF CRIMINAL PROCEDURE.

§ 399, *People v. Noelke.* 137
 § 467, *People v. Kelly.* 526

COMMON CARRIER.

A carrier of passengers, by the sale of a passenger ticket, as incident to the contract, without any specific agreement or separate compensation, becomes obligated to carry the baggage of the passenger to a reasonable amount, and to deliver it at the end of the route to the passenger or his duly authorized agent. *Isaacson v. N. Y. C. & H. R. R. R. Co.* 273

CONFLICT OF LAWS.

1. The C. W. R. R. Co., a Connecticut corporation, in pursuance of the laws of that State, to secure certain bonds issued by it, executed to the State treasurer a mortgage, which, by its terms, covered all the railway lands and personal property then or thereafter belonging to said corporation, and all its rights and franchises under its charter. Default having occurred in payment of interest as provided for by the bonds, the corporation formally surrendered its property to plaintiff as such trustee. Defendant, as sheriff, by virtue of an attachment issued in an action brought in this State against said corporation, levied upon certain of its personal property found here. In an action to recover possession thereof, *held*, that the bonds, having been issued by the State comptroller as required by the law of Connecticut, and being valid upon their face, plaintiff was not bound to show that the provisions of the law authorizing their issue had been complied with, but the burden was upon defendant to show their invalidity. *Nichols v. Mase.* 160
2. Also *held*, that the fact that the mortgage was not filed as required by the statutes of the State in reference to chattel mortgages (Chap. 279, Laws of 1883), or recorded as a mortgage of real estate as provided in reference to railroad mortgages (Chap. 779, Laws of 1868), did not affect its validity; that its validity was to be determined by the laws of Connecticut. *Id.*
3. Also *held*, in the absence of proof to the contrary, it was to be assumed that the property in question was in Connecticut at the time of the execution of the mortgage, and the mortgage being valid under the laws of that State, it was valid and enforceable here. *Id.*

CONSTITUTION.

The provision of the State Constitution (Art. 10, § 3), declaring that where duration of an office is not

provided by the Constitution or declared by law "such office shall be held during the pleasure of the authority making the appointment," applies only when the power is continuous. *Bergen v. Powell.* 591

CONSTITUTIONAL LAW.

1. Neither the provisions of the Federal Constitution, giving to Congress power to regulate commerce among the States, nor that which forbids the passage of any law impairing the obligation of contracts, prevent a State from passing laws prohibiting the making of contracts within its jurisdiction, which are deemed immoral or against the public policy of the State. *People v. Noeike.* 137
2. The State, therefore, may prohibit the sale, within its jurisdiction, of tickets in a lottery organized in another State, and which is lawful under the laws of that State; and a sale of such tickets is a violation of said statutory provision. *Id.*
3. The act of 1869 (Chap. 678, Laws of 1869), declaring that on a criminal trial the accused "shall, at his own request, but not otherwise, be deemed a competent witness," is not violative of the provision of the State Constitution (Art. 1, § 6), declaring that no person shall "be compelled in any criminal case to be a witness against himself." The supposed moral coercion by reason of the adverse inference which might be drawn from the omission of the accused to testify is not compulsion within the meaning of the Constitution. *People v. Courtney.* 490
4. It seems that, had the statutes authorized a presumption of guilt from an omission to testify and so reversed the presumption of innocence, it would violate fundamental principles binding alike upon the legislature and the courts; but as it expressly precludes any presumption against

the accused it is not subject to this objection. *Id.*

5. The words "tenement-houses" in the title of the act entitled "An act to improve the public health in the city of New York by prohibiting the manufacture of cigars and preparation of tobacco in any form in the tenement-houses of said city" (Chap. 93, Laws of 1883), refer to a distinct class of houses recognized and defined by law, and the subject of the act as expressed in the title is limited to that class of buildings. *In re Paul.* 497

6. The subject of the section of said act (§ 1) prohibiting the manufacture of cigars or preparation of tobacco "in any rooms or apartments which in the city of New York are used as dwellings, for the purpose of living, sleeping or doing any household work therein," is not embraced in the title; its inclusion, therefore, in the act is violative of the provision of the State Constitution (Art. 3, § 16) declaring that no private or local bill "shall embrace more than one subject, and that shall be expressed in the title," and said section is void. *Id.*

7. The court has no power to change and narrow the terms of an act for the purpose of bringing its subject within the title, and so saving it from the constitutional objection. *Id.*

8. *It seems* that, striking out said section, the act does not prohibit the manufacture of cigars or preparation of tobacco in tenement-houses; the only other prohibition is (§ 2) against the use "for dwelling purposes" of "any part of any floor of any tenement-house" where such manufacture or preparation is carried on. *Id.*

— *The provisions of the Revised Statutes* (1 R. S. 338, §§ 4 et seq.) providing a mode for the payments of the debts of a town the territory of which has been divided, are constitutional.

See People, ex rel. v. Supervisors. 263

— *The act for widening Sackett street in the city of Brooklyn constitutional and city liable for assessments under it.*

See Genet v. City of Brooklyn. (Mem.) 645

CONSTRUCTION.

In construing the description clause in a conveyance such an interpretation will be adopted as shall give effect to the intention of the parties if it can be ascertained from the instrument. For this purpose any particular may be rejected if inconsistent with other parts of the description, and if sufficient remains to locate the land intended to be conveyed. *Brookman v. Kurzman.* 273

— *Of deed. See Groat v. Moak.* 115

CONTRACT.

1. Plaintiffs agreed to prosecute two actions for defendant for a specified sum as retaining fee, an allowance for each day's attendance before a referee, and a percentage of any recoveries. Because of non-payment of the retaining fee, and the daily allowance, plaintiffs, as the referee found, "refused to be bound by the contract," but they continued thereafter as attorneys of record and acted in that relation, and as such, without the knowledge of their client and in hostility to his interests, stipulated to vacate an order in his favor, granted in one of said actions. *Held*, that plaintiffs' contract was an entire one; that conceding because of the non-payment of fees, they might refuse to act, they could waive the default, and having so done, by acting as attorneys thereafter, and their action being wrongful and adverse to their client, they were not entitled to compensation for any services in said suit. *Andrews v. Tyng.* 16

2. Before plaintiffs' refusal to be bound a judgment against defendant had been rendered in the other of said actions. *Held*, that plaintiff-

iffs could only recover under and according to the terms of the contract. *Id.*

8. Three persons, who had jointly indorsed the notes of a manufacturing corporation, entered into a written agreement with each other to the effect that if the corporation should fail to pay said notes at maturity they would each pay one-third of the amount unpaid, and in case of failure of either to pay his proportion, and either of the others should pay more than his share, the one so paying should "have and recover from the one so failing an amount equal to his aliquot part." It was also agreed that each of the parties should execute, to a trustee named, a mortgage as security for the performance of his agreement; and it was provided that in case of failure of one of the parties to pay his share of the unpaid paper, "and which either of the parties shall have paid in whole or in part, then and in that case the said trustee is empowered, and it shall be his duty, at the request of the parties so having paid, to foreclose the mortgage made by the party" so failing to pay. Mortgages were executed as required; each stated that it was given to secure the payment of \$25,000, according to the conditions of the agreement. The corporation made default in the payment of certain of the notes. In an action brought by the trustee and the holders of certain of said notes to foreclose one of the mortgages, it was shown that the corporation and the indorsers were insolvent, and that nothing had been paid upon said notes by any of the parties. *Held*, that the trust was not created for the benefit of the creditors, but solely for that of the parties to the agreement; that it imposed no primary liability upon the latter; and that the holders of the notes were not entitled to be subrogated to the rights of the indorsers in the securities; also that the action could not be maintained, as there had been no breach of the condition of the agreement, authorizing a foreclosure, as neither of the other

parties thereto had paid any portion of the sum which the mortgagor was thereby bound to pay. *Seward v. Huntington.* 104

4. Where an authorized agent executes a contract under seal, in which he represents himself as agent, and discloses his principal, and by the terms of which he assumes to contract for the principal only, in the absence of any personal promise or covenant on his part, the contract cannot be held to be his contract and he cannot be made liable individually thereon, although it is signed only in his individual name. *Whitford v. Laidler.* 145
5. In an instrument purporting to be a lease, executed by plaintiff as lessor, various persons named, including the defendants, describing themselves as the officers of a corporation named, were designated as "party of the second part," i. e. lessee. The demise was to the parties of the second part, and their successors in office. They, as such officers, covenanted on behalf of "themselves, and their successors in office," to pay the rent specified. The defendants signed and sealed the instrument in their individual names; the corporate seal was not attached. In an action in which defendants were sought to be charged individually for the payment of rent due, it appeared that the contract was recognized and ratified, both by the corporation and plaintiff, as the contract of the corporation; it took possession of the demised premises, and paid rent upon demand by plaintiff of its treasurer. *Held*, that defendants were not personally liable. *Id.*
6. *It seems* that although because of the absence of the corporate seal the corporation might not have been liable in a technical action of covenant, it was liable in an action of *assumpsit* for use and occupation. *Id.*
7. After plaintiff and defendants had signed, the instrument was, by their mutual consent, left with one K. to procure the signatures of the

other officers named therein, who was instructed, after accomplishing this, to deliver the instrument to the town clerk. *Held*, that as the delivery was thus conditioned upon the approval of the remaining officers, evidenced by their signatures, until this was done, the contract was incomplete and unexecuted; and, in the absence of proof of a waiver of the condition by defendants, did not take effect as a valid contract between any of the parties.

Id.

8. Also *held*, that it was immaterial that plaintiff did not hear statements made by defendants, at the time of signing, that they would not consider themselves bound unless all of the officers signed, as that was the legal effect of the transaction.

Id.

9. It is competent for the parties to a contract to agree upon the method of its execution and delivery, and, so long as any material stipulation in this respect remains unperformed, the instrument is inoperative as a contract.

Id.

10. An oral contract, which equity will regard as equivalent to the grant required at common law to create an easement, must be clear and specific so that it may be carried out and enforced, and it must be accompanied by acts of part performance, unequivocally referable to the agreement. *Cronkhite v. Cronkhite*. 323

11. An ordinance of the city of New York requires the insertion in every contract for work done for the city, of a clause that payment of the last installment due thereunder shall be retained until satisfactory evidence is furnished "that all persons who have done work or furnished materials under such contract," and who have given ten days written notice that a balance is due them, have been fully paid or secured. In an action by a contractor to recover the last installment due on a contract, *held*, that conceding a material-man could by filing the prescribed notice obtain a lien upon the fund in the hands

of the city, as to which *quære*, he could not obtain a lien upon the balance due under one contract for materials furnished upon another. *Quinlan v. Russell*. 350

— Under contract for construction of cemetery vault, payment of last installment was to be made when work was finished to satisfaction of owner; one item of the work not having been done as owner desired, he did it himself, charging cost against the builder, and after it was finished, expressed himself satisfied with the work. *Held*, there was a substantial performance, and the contractor was entitled to recover balance, less the cost of the work so done.

See McKenzie v. Decker. (Mem.) 650

CONVERSION.

Where a complaint alleged that plaintiff intrusted to defendant a sum of money upon his promising to invest the same for the former, but that he converted it to his use and refused to pay the same, *held*, that plaintiff, in the absence of any amendment of the complaint, was not entitled to recover upon proof that defendant did in good faith invest the money, but negligently took insufficient security; that it was necessary to show either that defendant made no investment, or if he did in form, that it was not *bona fide*. *King v. MacKellar*. 317

CORPORATIONS.

1. In an instrument purporting to be a lease, executed by plaintiff as lessor, various persons named, including the defendants, describing themselves as the officers of a corporation named, were designated as "party of the second part," *i. e.*, lessee. The demise was to the parties of the second part, and their successors in office. They, as such officers, covenanted on behalf of "themselves, and their successors in office," to pay the rent specified. The defendants signed and sealed the instrument in their individual names; the corporate seal was not attached. In an ac-

tion in which defendants were sought to be charged individually for the payment of rent due, it appeared that the contract was recognized and ratified, both by the corporation and plaintiff, as the contract of the corporation; it took possession of the demised premises, and paid rent upon demand by plaintiff of its treasurer. *Held*, that defendants were not personally liable. *Whitford v. Laidler*. 145

2. *It seems* that although because of the absence of the corporate seal the corporation might not have been liable in a technical action of covenant it was liable in an action of *assumpsit* for use and occupation. *Id.*

3. *It seems*, also, that, having contracted in the corporate name, neither the plaintiff nor the lessee named could have questioned its corporate character, had the instrument been properly executed. *Id.*

4. A corporation, in the absence of statutory restrictions, has the right to prefer one creditor to another in the distribution of its property. *Coats v. Donnell*. 168

5. The provision of the Revised Statutes (1 R. S. 593, § 9), prohibiting preferences by insolvent corporations, does not apply to foreign corporations. *Id.*

6. B. held a certificate of ten shares of the stock of a corporation; by the terms thereof the shares were transferable upon the books of the company only on production of the certificate; B. assigned and transferred the certificate to plaintiff, but no transfer was made on the company's books; after the death of B. defendant, with whom said corporation had been consolidated, without knowledge of such transfer and on representation that the certificate was lost, transferred the stock on its books to B.'s administrator, and issued to him a certificate therefor, upon his executing and delivering to it a bond of indemnity; it also paid to him

certain dividends which had been declared upon the stock. In an action to compel a transfer to plaintiff of the stock, and payment of the dividends, *held*, that plaintiff was entitled to a certificate for the ten shares, as the transfer to the administrator was unauthorized; but that defendant was not liable for the dividends, as until notice or knowledge of a transfer it was justified in paying the same to the person in whose name the stock stood upon its books, or to his legal representatives; and that, as the administrator was not required by any rule of law to produce the certificate on payment to him of the dividends, his failure so to do was not such a notice as put defendant upon inquiry before payment; also that the receipt of the bond of indemnity did not affect defendant's rights or charge it with notice. *Brisbane v. D. L. & W. R. R. Co.* 204

7. Proof that at the time of a transfer or assignment by a corporation it was in fact insolvent is not conclusive evidence that the transfer or assignment was made "in contemplation of the insolvency of such company," within the meaning of the statute (1 R. S. 608, § 4) declaring such a disposition of its property unlawful and void; to come within the prohibition of the statute the act must have been done because of existing or contemplated insolvency. *Paulding v. Chrome Steel Co.* 334

8. Money was loaned to a corporation in 1874 under an agreement with it that payment should be secured by chattel mortgage. A mortgage was accordingly executed by the president and secretary of the corporation, with the actual assent of the stockholders, but without the filing of a written assent in the county clerk's office as required by the act of 1871 (Chap. 481, Laws of 1871). In 1879, the debt remaining unpaid, the formal assent of the stockholders was given and filed as required by said act and the act of 1878 (Chap. 163, Laws of 1878), and a new mortgage was executed in lieu of

the former one, and in pursuance and fulfillment of the original agreement. At this time the corporation was insolvent. *Held*, the evidence did not authorize a finding that the mortgage was given in contravention of the statute. *Id.*

9. As to whether any but the stockholders of a corporation can complain that the statutory condition was not complied with, *quære. Id.*

10. In 1878 L., plaintiff's testator, became a member of the corporation defendant. By its by-laws, in force at the time, it was provided that upon the death of a member, "the sum of one thousand dollars, collected by contributions from all the lodges in this district, shall be paid to the wife of the deceased, if living, and, if dead, to his children, and, if there are none, then to such person as he may have formally designated to his said lodge prior to his decease," said sum to be collected by assessments upon the lodges in the district. The testator, having no wife or children, designated his mother as the beneficiary. The designation described the payment directed as "the \$1,000 my heirs are to receive." The mother died before the testator, and no other designation in the manner specified was made. In an action to recover said sum, *held*, that the testator had no interest in the fund which could descend, or upon which a will could operate, but simply a power of appointment which, if not exercised prior to his death, in the manner specified, became inoperative; and that, as the beneficiary named died before him, and no other designation was made as prescribed, defendant was not bound to pay to any one; that the reference to "heirs" in the designation could not be interpreted as making them the recipients, but was only matter of description. *Hellenberg v. Dist. No. 1, I. O. B. B.* 580

See BANKS AND BANKING.
FOREIGN CORPORATIONS.

See MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
STOCKS.

COSTS.

The General Term has no power on appeal by a railroad company from one order of confirmation of the report of commissioners appointed in proceedings to acquire title to lands, to award costs against the owners. *In re N. Y. W. S. & B. R. Co.* 287

— *Of unsuccessful appeal by testamentary trustee from decree of surrogate in proceeding to compel him to account may be imposed upon him individually.*

See *In re McCarter.* 558

COUNTER-CLAIM.

In an action upon a guaranty of payment of rent, reserved by a lease of certain rooms in a building, defendants set up, by way of counter-claim, and proved damages to the furniture and fixtures of the lessee by reason of a flow of water from other parts of the building under the control of the lessor, because of defective water pipes, which he, after notice, omitted to keep in order, and an assignment of such damages to defendants. No question was raised upon the pleadings, and no objection was made upon the trial that the liability of the landlord was not the proper subject of a counter-claim. *Held*, that it could not be raised upon appeal. *Vann v. Rouse.* 401

COUNTIES.

See KINGS (COUNTY OF).

COUNTY JUDGE.

1. When the county judge is absent from the county a delivery to his clerk, at the office of the county judge, of the inventory of an

assignor for the benefit of creditors, is a substantial compliance with the provision of the statute (§ 3, chap 466, Laws of 1877), requiring such inventory to be delivered to the county judge of the county where the assignment is recorded. *Pratt v. Stevens.* 387

2. So, also, a delivery of the inventory to the county judge of an adjoining county, who at the time is holding court in the county, is sufficient, as under the act of 1877 (Chap. 11, Laws of 1877) such county judge is clothed with all of the powers, and may perform all of the duties of the county judge of the county. *Id.*

COURTS.

See GENERAL TERM
SURROGATE'S COURT.

COVENANT.

1. Where a conveyance of real estate, purporting to be an indenture and containing a clause by which the grantee assumes and agrees to pay a mortgage upon the lands conveyed, has been accepted by the grantee, it will, for the purpose of a remedy against the grantee, be considered as the deed of both parties, and the clause as a covenant. *Bowen v. Beck.* 86
2. *It seems*, the grantee, in a conveyance by deed-poll containing a mortgage assumption clause, upon acceptance of the deed, becomes bound as covenantor to pay the mortgage. *Id.*

CRIMINAL TRIAL.

1. Upon trial of an indictment, charging a violation of the provision of the Revised Statutes (1 R. S. 666, § 29) prohibiting the sale of lottery tickets, defendant was called as a witness in his own behalf; on cross-examination he was asked whether he had been engaged in the business of lottery tickets and lottery policies; also whether he had been

tried and convicted of violating the law prohibiting the sending of lottery circulars through the mail. These questions were objected to, and objections overruled. *Held* no error. *People v. Noelke.* 137

2. The act of 1869 (Chap. 678, Laws of 1869), declaring that on a criminal trial the accused "shall, at his own request, but not otherwise, be deemed a competent witness," is not violative of the provision of the State Constitution (Art. 1, § 6), declaring that no person shall "be compelled in any criminal case to be a witness against himself." The supposed moral coercion by reason of the adverse inference which might be drawn from the omission of the accused to testify, is not compulsion within the meaning of the Constitution. *People v. Courtney.* 490

3. *It seems* that, had the statute authorized a presumption of guilt from an omission to testify, and so reversed the presumption of innocence, it would violate fundamental principles binding alike upon the legislature and the courts, but as it expressly precludes any presumption against the accused it is not subject to this objection. *Id.*

4. A motion for arrest of judgment in a criminal action could not, before the adoption of the Code of Criminal Procedure, and cannot now, be made, save for some defect that appears upon the record; it may not be based upon proof by affidavit of facts outside, and constituting no part of the record. (Code of Criminal Procedure, § 467.) *People v. Kelly.* 526

5. Proof by affidavit that the jury on trial of such an action, after retiring to their room, sent a written communication to the presiding judge, and that he answered the same in writing, in the absence of proof as to the nature of the communication, is not sufficient to sustain a motion for a new trial. *Id.*

6. Upon the trial of an indictment for an assault with a deadly weapon with intent to kill, it ap-

peared that, at the time of the occurrence, defendant was in pursuit of S., with whom he had had a difficulty. S. was called as a witness for the prosecution, and on cross-examination, testified that he had collected money for and given it to the complainant. He was then asked "When did you hand it to him?" This was objected to, and excluded. *Held* no error. *Id.*

7. Evidence on the part of defendant was offered and rejected as to violent acts on the part of S. at other times. *Held* no error. *Id.*

8. *It seems*, that, if it had appeared that the assault was committed in self-defense, proof as to the character of the complainant would have been competent, but as it appeared that it was not so committed, even such evidence would have been incompetent. *Id.*

9. It is within the discretion of the court on a criminal trial to fix a limit upon the time to be used by counsel in summing up the case to the jury, and unless it appears that the discretion has been abused, it is not a subject for review on appeal. *Id.*

10. Where the time allotted to the defendant's counsel was thirty minutes, and to the district attorney twenty-five, and it appeared that the former was stopped by the court at the expiration of his time, but that the latter continued his address for five minutes more than his allotted time, when he was stopped, *held*, that this did not tend to establish an abuse of discretion; that the defendant's counsel had the right to ask the court to stop the district attorney at the expiration of his time, and not having done so, there was no ground for complaint. *Id.*

DAMAGES.

1. The General Term of the Supreme Court has no authority on appeal to determine the amount of unsettled damages; at least where no facts are found below upon which

an estimate as to the true amount can be made. *Andrews v. Tynng.* 16

2. Accordingly *held*, where on trial before a referee in an action for attorney's services wherein the defendant set up a breach of the contract of employment on the part of plaintiffs, and the referee found the breach, but allowed only nominal damages, and where the General Term decided this to be erroneous and that defendant was entitled to substantial damages, that it was error for the General Term to fix the damages; that it only had authority to order a new trial, so that the amount of damages might be determined by a trial court. *Id.*

3. Where a publication is libelous *per se*, and is proved to be false, this is evidence sufficient to require the submission of the question of malice to the jury, and to warrant the allowance of exemplary damage; and this, although defendant give evidence tending to prove no actual malice. Such evidence is to be considered by the jury, and it is for them to determine, in view of all the evidence, whether punitive damages should be allowed or not. *Bergmann v. Jones.* 51

4. Where premises have been conveyed absolutely to secure a loan, and, because of a refusal on the part of the lender to reconvey on tender of the amount due, the borrower brings an action to compel a reconveyance, he cannot, after judgment in his favor in such an action, maintain another action to recover, as damages, the amount of a depreciation in the value of the property pending the litigation, or his costs and expenses in the equity suit; conceding an action to recover damages may be maintained, as to which *quære*, these are not proper items of damages. *Marvin v. Prentice.* 295

5. As to whether the judgment in the equity suit would be a bar to an action for damages, *quære.* *Id.*

6. Satisfaction by one joint tortfeasor is a bar to an action against another; so a partial satisfaction by one is proper to be shown by another in mitigation of damages. *Knapp v. Roche*. 529

7. In an action brought by a receiver of an insolvent savings bank against an officer thereof to recover damages for losses alleged to have been occasioned by illegal loans made by him, it appeared that two other officers co-operated in making the loans; the complaint averred and it also appeared by plaintiff's evidence that portions of such loans remained unpaid. Defendant then offered to prove payment by one of the other officers of a specified sum on account of such claim; this was objected to and excluded. *Held* error; that to maintain the action it was not sufficient to allege and show illegal loans merely, but also damages resulting therefrom, as that the loans had not been paid; and therefore it was competent in reduction of damages to show that a portion of the moneys illegally taken from the bank had been refunded by one jointly liable with defendant therefor; also that the evidence was proper under a general denial in the answer. *Id.*

8. *It seems* that one whose negligence has occasioned a personal injury to another is liable for the proximate consequences of his act, although these are aggravated by reason of the delicate health of the person injured; the liability is not limited to such consequences of the injury as would have resulted if the person had been in good bodily health. *Tice v. Munn*. 621

9. Where interest is allowed, not by virtue of any contract to pay it, but simply as damages because of default in the discharge of an obligation, the legal rate of interest must govern. *Sanders v. L. S. & M. S. R. Co.* 641

10. Where, therefore, in an action to require defendant to declare and pay dividends on certain preferred and guaranteed stock, it appeared

that the dividends were due and payable prior to January 1, 1880, when the act (Chap. 533, Laws of 1879) fixing the rate of interest at six per cent went into effect, *held*, that plaintiff was entitled to interest at the rate of seven per cent up to that date, and six per cent thereafter. *Id.*

— *Extent of liability of stock-broker for unauthorized sale.*
See Porter v. Wormser. 431

DEBTOR AND CREDITOR.

1. A corporation, in the absence of statutory restrictions, has the right to prefer one creditor to another in the distribution of its property. *Coats v. Donnell*. 168

2. A debtor paying money to a creditor, to whom he owes several debts, must, as a general rule, exercise his option as to the application of the payment at the time it is made. *Bk. of California v. Webb*. 467

3. If no direction is then given by him the creditor may control the application; and, as between him and the debtor, there is no limit of time within which he must make the application, save that it be before it is made under the direction of the court, at least unless the debtor requests him to exercise his option. *Id.*

DECEIT.

See FALSE PRETENSES.

DEED.

1. Where a conveyance of real estate, purporting to be an indenture and containing a clause by which the grantee assumes and agrees to pay a mortgage upon the lands conveyed, has been accepted by the grantee, it will, for the purpose of a remedy against the grantee, be considered as the deed of both parties, and the clause as a covenant. *Bowen v. Beck*. 86

2. *It seems*, the grantee, in a conveyance by deed-poll containing a mortgage assumption clause, upon acceptance of the deed, becomes bound as a covenantor to pay the mortgage. *Id.*
3. In 1841 the P. C. M. Co. owned lands on both sides of the S. river, also the bed of the river; a dam across it and all the water power created thereby. Upon its lands, on one side of the river, was a cotton factory, on the other side a grist-mill, both run by such water power. In that year said corporation conveyed to C and M, the grist-mill property, covenanting that the grantee should have and might use the water necessary to operate the grist-mill, "with the exception of the water * * reserved"; by a clause in the deed the grantor reserved to itself "the right at all times to use so much of the water of the river and dam, which now is or may hereafter be therein, or in any dam erected hereafter, as shall be necessary to operate the present or any additional machinery which may be hereafter put in the building now" used as a cotton factory, "or in any building to be erected on the site thereof, of the like or less dimensions." At the time of the conveyance there was in operation, in the factory, machinery requiring one hundred horse power to operate it. The machinery was subsequently changed, and an addition was built to the factory, in which machinery was placed. Plaintiff succeeded to the rights of the P. C. M. Co., but never operated machinery in the mill requiring more than forty horse power; the machinery in the addition required from ten to twenty horse power to run it. In the summer and fall of 1879 the water of the river was low, and with what was reserved and stored in the pond at night, there was not sufficient to operate plaintiff's machinery in the day-time. Defendant, who had succeeded to the rights of C. and M., continued to draw water from the pond to operate his grist-mill. In an action to recover damages and to restrain a further diversion of the water, *held*, that the reference in the reservation to the machinery then in the factory was a measure of quantity not a limitation on the use; that the quantity so reserved could be used for any purpose or anywhere; but beyond that quantity, if power was desired for additional machinery, it could only be used for such as was placed in the original factory building, or one erected on its site; that, therefore, so long as plaintiff did not use more than one hundred horse power, he could use that quantity to propel the machinery either in the main building or the addition, and up to that point, so far as needed to run his machinery, he was entitled to the exclusive use. *Groat v. Moak.* 115
4. The S. river is a public highway; at the place where the dam was erected it was only navigable by row boats. The right to build and maintain a dam, not exceeding eight feet high, was granted by various statutes (Chap. 149, Laws of 1811; chap. 20, Laws of 1835; chap. 531, Laws of 1864), subject, however, to a condition that through it a lock for the passage of boats should be made and kept in repair. A dam was built many years before 1841 and maintained from the time of its construction down, but no lock was ever constructed therein. In 1841 the dam was about nine feet high; in 1879 it was nine feet five inches high and to the top of the flush-boards, which were used during the whole summer and fall of that year, the height was ten feet six inches. Defendant claimed the right to draw water from the pond when the water was more than eight feet deep at the dam, and at no time used the water when it could not have run over a dam eight feet. *Held*, that such claim was untenable; that, as against the defendant, plaintiff had the right to maintain the dam at any height, and to hold and store the water required to produce power sufficient to operate his machinery, and to use all the water so stored so far as necessary to produce such power; and whenever there was not sufficient

water to give that power, any use of it by defendant was unauthorized and unlawful. *Id.*

5. While it is essential that premises upon which a grant is to operate must be so described therein that they can be identified, it is not necessary that they should be described by boundaries, courses or distances, or by reference to monuments. *Coleman v. M. B. Imp. Co (Limited)*. 229

6. Where words of general description are used, oral evidence may be resorted to to ascertain the particular subject-matter to which they apply, and if, with the aid of such evidence, the premises can be located, the grant will not fail. *Id.*

7. The provision of the Revised Statutes, declaring a grant of land void if at the time of delivery thereof the land shall be in the actual possession of one claiming under a title adverse to that of the grantor, does not apply to a deed from an assignee in bankruptcy, made in pursuance of an order of the bankruptcy court. *Id.*

8. A deed described the granted premises as "Pelican beach, near Barren island." In an action of ejectment it appeared that the name "Pelican beach" was originally applied to the salt meadows, marsh and beach on the westerly end of Barren island. An inlet subsequently opened across said beach, separating a greater portion thereof from the island. The title of the grantees to the beach was undisputed. *Held*, that the deed was not void for uncertainty, but related to, and conveyed that portion of Pelican beach cut off from the island by the inlet. *Id.*

9. The deed was executed in 1855; plaintiff claimed title under a deed executed to him in 1880, by an assignee in bankruptcy of one who took title from the original grantee. The assignee executed the deed under an order of the bankruptcy court, made upon petition of the bankrupt, showing that plaintiff purchased of him,

and paid for the lands in question, together with other lands in 1856, and that by mistake they were omitted from the deed; the assignee's deed recited that it was made to correct such mistake. At the time of the delivery of the assignee's deed defendant was in possession, claiming under a deed executed in 1877 by the grantors in the deed of 1855. *Held*, that the bankruptcy court had power to give the relief granted by its order, in the absence of any objection by the parties in interest; and that the deed was not void as champertous. *Id.*

10. A deed described the premises conveyed as situate in the city of New York, and bounded as follows: "Beginning at a point on the westerly side of Second avenue, distant fifty feet and ten inches from the south-easterly corner of Second avenue and One Hundred and Eleventh street; thence westerly and parallel with said One Hundred and Eleventh street, and partly through a party wall, eighty feet; thence southerly and parallel with Second avenue fifty feet; thence easterly and parallel with said One Hundred and Eleventh street eighty feet, to the westerly side of Second avenue; thence northerly and along said Second avenue fifty feet, to the place of beginning." The grantors had title to premises which would be included in the description if the word "south-easterly" were changed to south-westerly, and the grantees conveyed to plaintiff by deed, in which the description was thus changed. *Held*, that the use of the word "south-easterly" was not such a defect as justified defendant, a purchaser, in refusing to accept title; that by the intrinsic evidence furnished by the deed it appeared indisputably that the intent was to use the word "south-westerly." *Brookman v. Kurreman*. 272

11. In construing the description clause in a conveyance such an interpretation will be adopted as shall give effect to the intention of

the parties if it can be ascertained from the instrument. For this purpose any particular may be rejected if inconsistent with other parts of the description, and if sufficient remains to locate the land intended to be conveyed. *Id.*

— *Where not void for champerty.*
See Whiting v. Edmunds. 309

See GRANTOR AND GRANTEE.

DEFENSES.

1. *It seems* that under the law of this State a subsequent lienholder, by mortgage, judgment or mechanic's lien, may avail himself of the defense of usury against a prior mortgage. *U. D. Segs Inst'n v. Wilmot.* 221
2. *It seems* that when it appears, in an action to recover for goods sold, by plaintiff's own proof, or upon a defense properly interposed, that the goods were bought and sold for the purpose of being introduced into the country in violation of its revenue laws, and that the vendor shared in the illegal transaction or assisted in defrauding the customs, plaintiff may not recover; but unless it appears upon plaintiff's own showing or is pleaded as a defense, defendant is not entitled to the benefit of it as such. *Honegger v. Wettstein.* 252
3. After an arrest of a judgment debtor under a body execution unlawfully issued, the judgment creditors notified the sheriff that they "countermanded" the execution, and the latter thereupon informed the prisoner that he had been directed to discharge him if he would sign a stipulation not to sue for false imprisonment, and upon the prisoner's refusal assured him that if he did not sign it "he would have to stay in jail a long time." The prisoner then signed and was discharged. In an action for false imprisonment, *held*, that the release was void for duress and so furnished no defense. *Guillaume v. Rowe.* 268

SICKELS — VOL. XLIX.

— *In action for diverting water from plaintiff's dam, defendant cannot object that the stream is a highway and the dam an unlawful obstruction thereof.*

See Groat v. Moak. 115

— *In actions commenced prior to Code of Civil Procedure, the statute of limitations of another State no defense.*

See Clark v. L. S. & M. S. R. Co. 217

DEFINITIONS.

1. The word "lottery" indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. *People v. Noelke.* 187
2. The provision of the Code of Civil Procedure (Subd. 3, § 414), exempting from the operation of the chapter (4), limiting the time for the commencement of actions, a case where a person was entitled to commence an action when the Code took effect, and declaring that in such a case "the provisions of law applicable thereto immediately before this act takes effect continue to be so applicable, notwithstanding the repeal thereof," does not refer simply to statutory provisions, but within the meaning of said exception a rule or doctrine established by judicial decision is a "provision of law" equally with one enacted by the legislature. *Clark v. L. S. & M. S. R. Co.* 217

DEMURRER.

See PLEADINGS.

DESCENT.

As a general rule contingent interests are assignable, devisable and descendible the same as vested interests. *Kenyon v. Sec.* 563

DEVISE.

1. Under the will of D. his widow took a fee in certain real estate,

determinable upon her remarriage, and plaintiff, an infant, a contingent fee, depending upon the happening of that event. Proceedings were instituted under the statute for a sale of plaintiff's interest, in which defendant T, the executor of the will of D., was appointed special guardian for plaintiff; the proceedings resulted in a sale; T., as special guardian, and the widow executed a conveyance to the purchaser, who executed to T. as such guardian a mortgage upon the lands for part of the purchase-money. T. foreclosed the mortgage, bidding in the lands, and receiving a conveyance in his own name, but paying no portion of the purchase-money; he executed a mortgage on the lands to defendant S., to secure a judgment recovered against him as executor. The widow subsequently remarried. In an action brought to compel the transfer of the title to, or in trust for, plaintiff, and a cancellation of the mortgage, *held*, that plaintiff was entitled to the relief sought; that conceding the court had no jurisdiction to direct the sale on plaintiff's interest, and so that the title was not divested, the court if directing the sale necessarily adjudged that the case was within the statute, and the conveyance to T. embarrassed plaintiff's title; that the action being brought to redress a violation of trust, defendants would not be permitted to defeat it by a suggestion that the apparent title so acquired may not, if allowed to stand, be effectual to divest plaintiff of her title. *Dodge v. Stevens.* 209

2. Defendant S. claimed to be entitled to a judgment, declaring that plaintiff as devisee was liable for his debt against the testator to the extent of the estate devised, and charging the same upon the lands. *Held*, that as plaintiff was not the sole devisee, as under the statute making devisees liable for the testator's debts (2 R. S. 452, §§ 82, 83, 86) in case of several devisees, they are to be prosecuted jointly, and the debt apportioned among them, and as all the devisees were not

parties, such relief could not be granted in this action. *Id.*

3. Also *held*, the fact that the other devisee had aliened his land, and was insolvent did not affect plaintiff's rights; that as the court, in enforcing the liability of devisees, proceeds not by virtue of its general jurisdiction, but simply under a special statutory authority, it could not disregard the limitations imposed by the statute. *Id.*
4. As a general rule contingent interests are assignable, devisable and descendible the same as vested interests. *Kenyon v. See.* 563

DISCOVERY AND INSPECTION.

After the granting of a General Term order herein, which in effect gave the defendant liberty to inspect plaintiffs' books and papers, plaintiffs moved, at a Special Term, on additional facts, for an order vacating or limiting the General Term order; the motion was denied on the ground that plaintiffs' remedy was by application to the General Term, but a stay of proceedings was granted for the purpose of such an application, unless defendant would stipulate to take an inspection under the supervision of a referee. Defendant refused to stipulate, and appealed. The General Term affirmed the order, and, upon the new facts presented, vacated its former order, and prohibited the making of a new order for an inspection. *Held*, that an inspection having been granted upon terms which the Special Term could lawfully impose, upon defendant's refusal to accept those terms it was in the discretion of the General Term to deny the inspection entirely, and the exercise of this discretion was not reviewable here. *Clyde v. Rogers.* 541

DOWER.

1. Where the alleged fraudulent conveyances were of the debtor's real estate to his wife, and the judgment set them aside, *held*, an objec-

tion to such judgment, that it did not provide for the wife's right of dower, could not be raised on appeal; that the remedy, if any, was by motion. *Wright v. Nostrand*. 31

2. *It seems* that such dower right is not affected by the judgment. *Id.*

DURESS.

After an arrest of a judgment debtor under a body execution unlawfully issued, the judgment creditors notified the sheriff that they "countermanded" the execution, and the latter thereupon informed the prisoner that he had been directed to discharge him if he would sign a stipulation not to sue for false imprisonment, and upon the prisoner's refusal assured him that if he did not sign it "he would have to stay in jail for a long time." The prisoner then signed and was discharged. In an action for false imprisonment, *held*, that the release was void for duress and so furnished no defense. *Guilleaume v. Rowe*. 268

DUTIES.

It seems that when it appears, in an action to recover for goods sold, by plaintiff's own proof or upon a defense properly interposed, that the goods were bought and sold for the purpose of being introduced into the country in violation of its revenue laws, and that the vendor shared in the illegal transaction or assisted in defrauding the customs, plaintiff may not recover; but unless it appears upon plaintiff's own showing or is pleaded as a defense, defendant is not entitled to the benefit of it as such. *Honegger v. Wettstein*. 252

EASEMENTS.

1. In 1832, J. & H., who owned adjoining farms, agreed orally to lay down logs or pipes upon the lands of J. to carry water from a spring

thereon to his buildings, for his use, and from thence to the buildings of H., for his use, each to bear one-half of the expense and perform half of the labor, and in consideration of such expenditure J. agreed that H. should have the right to take the surplus water from the spring through the pipes. There was no specific agreement, however, as to the size of the pipes, how long they were to be continued, who should direct or control them, or the amount of water to be taken, nor was there any arrangement authorizing H. to enter upon the lands of J. for the purpose of repairing, etc. The agreement was carried out, and H. and his successor in title enjoyed the use of the water for over forty years. In an action to restrain defendant, who succeeded to the title of J., from obstructing such use of the water, *held*, that these facts failed to establish a valid agreement in perpetuity; that at most the agreement was a mere license, which, although a consideration was paid, was revocable at the pleasure of the licensor or his successors in interest; that plaintiff could not claim by adverse possession, as the use was by consent, and not adverse. *Cronkhite v. Cronkhite*. 323

2. An oral contract, which equity will regard as equivalent to the grant required at common law to create an easement, must be clear and specific so that it may be carried out and enforced, and it must be accompanied by acts of part performance, unequivocally referable to the agreement. *Id.*

EJECTMENT.

— Where on foreclosure sale the referee was directed to pay out of proceeds of sale the amount of any liens for assessments, etc., *held*, that conceding the purchaser took title subject to any such liens, it only applied to valid liens, and that he could maintain ejectment against one in possession claiming under a sale upon an illegal assessment.

See Simms v. Voght. (Mem.) 654

ELECTION OF REMEDIES.

A devisee who claims a mere legal estate in the real property of the testator, when there is no trust, cannot maintain an action for the construction of the devise, but must assert his title by a legal action, or, if in possession, must await an attack upon it and set up the devise in answer to the hostile claim. *Weed v. Weed.* 243

EMINENT DOMAIN.

1. As to whether the general provisions applicable to appeals to this court extend to condemnation proceedings under the Railroad Act, *quære.* In *re N. Y., W. S. & B. R. Co.* 287
2. Upon motion to dismiss an appeal by a railroad company to the General Term from an order of Special Term confirming the report of commissioners appointed to condemn certain lands under water in the Hudson river, it appeared that under former proceedings the company had obtained possession and begun the construction of an embankment; these proceedings were subsequently annulled and the present proceedings instituted. On application of the company an order was granted allowing it to continue in possession until the final conclusion of the new proceedings, but requiring it to keep open a gap in the embankment for the benefit of the land-owners. The order confirming the commissioners' report provided that, on payment of the sums awarded, the company have full possession, and annulled all orders inconsistent with such possession. The company paid the awards and immediately closed up the gap. *Held,* that by so doing it did not waive its right of appeal from the order; that independent of the order, on payment of the awards, the condemnation was complete and final, the company was entitled to take full possession, the owners were divested of all estate and interest (§§ 17, 18, chap. 140, Laws of 1850), and nothing could be re-

viewed upon the appeal but the amount of the awards; and so, the company did not avail itself of any benefit conferred by the order appealed from, which should preclude it from appealing. *Id.*

EQUITY.

1. The rule that one who has purchased and received a conveyance of a portion of mortgaged premises may require that all of the balance shall first be sold to satisfy the mortgage, before resort shall be had to his portion, applies, although part of the residue is situated in another State. *Welling v. Ryerson.* 98
2. J. executed a mortgage upon his farm, a portion of which was situated in this State, the residue in New Jersey; he subsequently conveyed to R. five acres of that portion situate in this State, and thereafter executed another mortgage upon the whole farm. The owner of the two mortgages commenced foreclosure suits, one in this State to foreclose the first mortgage, another in New Jersey to foreclose both. In the first suit judgment was rendered, directing sale of the land in this State, without reference to that in New Jersey, and providing that the portion not sold to R. should be first sold. Pending proceedings to enforce the judgment, the grantee of R. tendered to the plaintiff in the foreclosure suit the amount due on his mortgage, with costs, and demanded an assignment of the mortgage, or a release of his land, which was refused. In an action brought to compel such assignment, *held,* that said grantee was entitled to the relief sought; and, it appearing that the two foreclosure judgments had been executed by sale of all the farm, save that sold to R., and that the amount realized therefrom was more than sufficient to pay the first mortgage, with all costs of foreclosure and sale, that R.'s grantee was entitled to have his land released and discharged from any liability. *Id.*

3. A mistake as to legal rights is not a ground for equitable relief. *Weed v. Weed.* 243
4. A trespasser upon real estate may not invoke the aid of a court of equity to preserve to him the fruits of his wrong, by restraining the party who was in possession from resuming his lawful occupation which was taken from him by the trespasser. *Littlejohn v. Aurill.* 619

EQUITABLE ASSIGNMENT.

—When order and acceptance amounts to equitable assignment of claim under a building contract, and as payment upon the contract. See *Gibson v. Lenans.* 183

ESTOPPEL.

1. The real owner of personal property is only estopped from asserting his title to it when and so far as he has allowed another to have the appearance of ownership. *Hente v. Miller.* 64
2. H. M. Cutter & Co., cotton brokers, falsely and fraudulently represented to plaintiffs that they had orders from the F. M. Co. to purchase for it one hundred bales of cotton, and relying thereon, plaintiffs contracted to sell that quantity to the corporation named. Bought and sold notes in the usual form were delivered by plaintiff's brokers, in which the sale was stated to have been made to said corporation. The notes contained the following: "Payment guaranteed by H. M. Cutter & Co. Bill to H. M. Cutter & Co." No bill, warehouse receipt or other muniment of title was in fact delivered to Cutter & Co. The cotton was delivered to that firm to be delivered to the supposed purchaser; they placed it in a warehouse, obtained advances upon the warehouse receipts, and it was subsequently sold to *bona fide* purchasers. In an action to recover possession of a portion of

the cotton, *held*, that the transaction, by means of which Cutter & Co. obtained possession, was a larceny; that the words "Bill to H. M. Cutter & Co." amounted merely to a memorandum, and taken with the rest of the contract imported that when the bill was made out to the purchaser named, it was to be sent to Cutter & Co.; and that, as plaintiffs had delivered to that firm no symbol of property, or indicium of title giving an appearance of ownership, they were not estopped from asserting their title and were entitled to recover. *Id.*

3. As against a purchaser in good faith and for value of a mortgage upon land, executed by one in possession of and holding the legal title to the land, the grantor of the mortgagor is estopped from claiming that the conveyance was induced by fraud on the part of the latter. *Simpson v. Del Hoyo.* 189
4. It is the right of a person, in order that he may obtain more than the lawful rate of interest for his money, to require securities which have had a valid inception, and which he may lawfully purchase at a discount greater than such rate; and when securities appearing on their face to be valid and subsisting obligations are produced to him, and he purchases them upon the faith of representations on the part of the parties thereto that they are what they appear, and that there is no defense, the parties are estopped from claiming that they had in fact no inception until thus purchased and so that they are usurious. *U. D. Savings Inst. v. Wilmot.* 221
5. The estoppel also binds the privies in estate of the parties, and when the securities so purchased are a bond and mortgage, a subsequent lienor, whether by mortgage or mechanic's lien, may not interpose the defense of usury, as such lienor can have no better right than the owner or borrower had at the time the lien was created. *Id.*

6. In an action to recover for services as upon a *quantum meruit* plaintiff is not concluded as to the value of the service by the amount originally claimed in the complaint, where the latter has been amended by increasing the amount, nor is he concluded or impeached by discrepancies between different bills of particulars furnished. *Sherwood v. Hauser.* 626

— *When grantee in a deed which reserves to grantor certain water-rights, estopped from denying grantor's right to the water.*

See Groat v. Moak. 115

— *Effect of payment of interest on mortgage as an estoppel from questioning its validity.*

See Bennett v. Bates. 354

EVIDENCE.

1. In an action to set aside alleged fraudulent conveyances made by a judgment debtor the judgment debtor was called as a witness for the defendants and gave material evidence. *Held*, that his evidence, taken in supplementary proceedings, was admissible, not only against him as an admission, but also as against all of the defendants, for the purpose of affecting his credibility by showing conflicting statements. *Wright v. Nostrand.* 31
2. A witness for plaintiff testified to the pendency of an action against the judgment debtor at the time of the conveyances, and to an attempt, upon the part of his attorney, to delay the recovery of judgment therein. *Held*, that a refusal to strike out such evidence was not error; that the evidence was proper as showing motive; and that the debtor might fairly be presumed to have had notice of the proceedings on the part of his attorney. *Id.*
3. On trial of an action for libel, where the alleged libelous publication contained charges injurious to plaintiff's character and to his business, and the complaint averred that by reason of the libel plaintiff had been greatly injured in his business, by the loss of good-will and patronage, plaintiff was permitted to testify as a witness that immediately after the publication his business fell off, and to state the amount of his daily sales up to and immediately after such publication. *Held* no error. *Bergmann v. Jones.* 51
4. Also *held*, that it was not error to allow plaintiff to testify to the efforts made by him to regain his business and to the hindrance he met with on account of the libel. *Id.*
5. Upon trial of an indictment charging a violation of the provision of the Revised Statutes (1 R. S. 666, § 29) prohibiting the sale of lottery tickets, defendant was called as a witness in his own behalf; on cross-examination he was asked whether he had been engaged in the business of lottery tickets and lottery policies; also whether he had been tried and convicted of violating the law prohibiting the sending of lottery circulars through the mail. These questions were objected to, and objections overruled. *Held* no error. *People v. Noelke.* 137
6. Where words of general description are used in a deed oral evidence may be resorted to to ascertain the particular subject-matter to which they apply, and if, with the aid of such evidence, the premises can be located, the grant will not fail. *Coleman v. M. B. Imp. Co. (Limited).* 229
7. The courts may take judicial notice of the system of checking baggage by railroad companies, and of the general practice, in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of its route to the next succeeding carrier, and so on until it reaches the possession of the last carrier. *Isaacson v. N. Y. C. & H. R. R. R. Co.* 278

8. In such an action evidence was given to the effect that plaintiff authorized the investment of the money in a second mortgage to be taken by defendant's wife on a conveyance by her of the mortgaged premises, that the premises were conveyed, the mortgage taken and assigned by the wife to plaintiff. The premises were sold on foreclosure of the first mortgage. The case was submitted to the jury solely on the question as to whether such assignment was a *bona fide* investment of plaintiff's money. It appeared that interest was regularly paid by the mortgagor from 1871, when the mortgage was given, until 1877. Defendant then offered evidence of the value of the property when the mortgage was given, which was objected to and excluded. *Held* error; that if in fact the mortgage was a substantial and good security when taken and assigned, this was material and proper upon the question of good faith. *King v. MacKellar*. 817
9. In an action brought by a receiver of an insolvent savings bank against an officer thereof to recover damages for losses alleged to have been occasioned by illegal loans made by him, it appeared that two other officers co-operated in making the loans; the complaint averred and it also appeared by plaintiff's evidence that portions of such loans remained unpaid. Defendant then offered to prove payment by one of the other officers of a specified sum on account of such claim; this was objected to and excluded. *Held* error; that to maintain the action it was not sufficient to allege and show illegal loans merely, but also damages resulting therefrom, as that the loans had not been paid; and, therefore, it was competent in reduction of damages to show that a portion of the moneys illegally taken from the bank had been refunded by one jointly liable with defendant therefor; also that the evidence was proper under a general denial in the answer. *Knapp v. Roche*. 320
10. Proof that at the time of a transfer or assignment by a corporation it was in fact insolvent is not conclusive evidence that the transfer or assignment was made "in contemplation of the insolvency of such company," within the meaning of the statute (1 R. S. 603, § 4) declaring such a disposition of its property unlawful and void; to come within the prohibition of the statute the act must have been done because of existing or contemplated insolvency. *Paulding v. Chrome Steel Co.* 834
11. Upon the trial of an action upon a promissory note it appeared that defendant executed the note for the accommodation of the payee, who indorsed the same to plaintiff; that said payee was dead, but that for a period of seventeen years after the note fell due he was within the jurisdiction of the court. Defendant then offered to show that plaintiff was in indigent circumstances during this period; this was objected to and excluded. *Held* error; that the evidence was proper as tending to fortify the presumption of payment or satisfaction arising from the lapse of time. *Bean v. Tonnels*. 381
12. Also *held*, that the error was not cured, or the objection waived, by the rejection, upon defendant's objection, of evidence offered by plaintiff, tending to explain the delay in bringing suit. *Id.*
13. In an action upon the bond of H., an insurance agent, defendants offered to prove that after a part of the alleged indebtedness had accrued, and after a breach of his contract on the part of H., the sureties notified plaintiff that they desired to withdraw their bond "and not be liable for any business" thereafter done; that to induce them to remain, plaintiff promised that he would require H. to account monthly and would see "that he did not get behind;" but if he did "he would immediately stop his business" and notify the sureties of the amount of the default; that, relying on this promise, the sureties suffered their liability to remain, and that plaintiff did not

- perform, but suffered the liability to increase without notification and without stopping H.'s business. This evidence was objected to as immaterial, and excluded. *Held* error. *Emery v. Balte*. 408
14. It was objected here that the offer did not allege that the sureties knew of the default of H. when they gave such notice. *Held* untenable; as this was fairly implied, and because if the objection had been taken on trial, it might have been explicitly asserted. *Id.*
15. It was also objected that the offer did not aver that the liability of the sureties had been increased beyond the one additional default of which they took the risk. *Held*, that the offer to show that plaintiff failed to stop H.'s business implied that plaintiff allowed it to continue and the indebtedness to increase after a time when, by the agreement, it should have been stopped. *Id.*
16. Upon the trial of an indictment for an assault with a deadly weapon with intent to kill, it appeared that, at the time of the occurrence, defendant was in pursuit of S., with whom he had had a difficulty. S. was called as a witness for the prosecution, and on cross-examination, testified that he had collected money for and given it to the complainant. He was then asked "When did you hand it to him?" This was objected to, and excluded. *Held* no error. *People v. Kelly*. 526
17. Evidence on the part of defendant was offered and rejected as to violent acts on the part of S. at other times. *Held* no error. *Id.*
18. *It seems*, that, if it had appeared that the assault was committed in self-defense, proof as to the character of the complainant would have been competent, but as it appeared that it was not so committed, even such evidence would have been incompetent. *Id.*
19. Upon the trial of an action against an agent, who had charge of certain business for his principal, for alleged embezzlement of moneys received on sales, and for the purpose of showing that defendant had not entered in his cash-book all the moneys received by him on sales, plaintiff called L., as a witness, who testified that he kept on a loose piece of paper an account from day to day of moneys received by defendant from cash sales during a period specified, which paper he gave to plaintiff, and that the entries therein were true statements of the transactions. Plaintiff then testified that he received the paper and had lost it, but that he copied the figures correctly in a memorandum-book, which he produced, and that the entries had not been altered. These entries were offered and received in evidence under objection. *Held* error; that the original writing was not one of the contents of which, if lost, could be proved by secondary evidence. *Peck v. Valentine*. 569
20. *It seems* that the original memorandum, had it been produced, could have been used by L. to refresh his recollection; or if it failed so to do, upon his testifying that it was a true statement of facts known to him at the time of the transaction, it might have been read in evidence in connection with, and as auxiliary to, his testimony. *Id.*
21. Where a release is unambiguous in its terms, oral evidence is inadmissible to show that it was intended to embrace other matters not specified therein. *Brady v. Read*. 631

[EXECUTION.

1. An execution, although it be so defective that it is subject to be vacated and set aside on motion, may not be treated as void when questioned in collateral proceedings, where the defects are amendable, or where all the essential facts necessary for the direction and protection of the sheriff are stated in the execution, or are plainly inferable from the facts stated. *Wright v. Nostrand*. 81

2. An execution was entitled on the outside "N. Y. Superior Court" with the names of the parties. It was directed to the sheriff of the county of New York, and stated in the body thereof that judgment was rendered March 2, 1874, in "the Superior Court," in favor of plaintiff and against defendant, as appeared by the judgment-roll on file in the office of the clerk of said court; that said judgment was docketed in the county of New York, and that there was "on the 4th day of March, 1874, the sum of \$604.95 actually due thereon." The sheriff was directed to collect that amount with interest from the date the judgment was rendered. *Held*, that the execution was not void and could not be questioned collaterally; that it was fairly inferable therefrom that the judgment described was rendered in the Superior Court of the city of New York and was for the amount asserted to be due thereon; and that the return of the sheriff of *nulla bona* was evidence of the exhaustion of legal remedies, sufficient to authorize the institution of an action to reach property of the judgment debtor. *Id.*

3. Where a person with full knowledge of all the facts, but through a mistaken belief that his interest in real estate was not subject to sale on execution, has lost his title through a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale after the time for redemption has expired, the court has no power to permit a redemption. *Weed v. Weed.* 243

4. *It seems* that the issuing of an execution against the person of a judgment debtor is within the scope of the implied authority of the attorney for the judgment creditor; and when such an execution is issued and the debtor arrested thereon in a case where it is not authorized, the client may be held liable, although there be no evidence that he directed either

the issuing of the execution or the arrest. *Guillaume v. Rowe.* 268

EXECUTORS AND ADMINISTRATORS.

1. The exclusive right conferred by the provisions of the act of 1871 (§ 4, chap. 835, Laws of 1871) as amended by the act of 1877 (Chap. 154, Laws of 1877) upon the public administrator of the county of Kings to administer upon the estates of persons who die, leaving assets in that county, when "there shall be no widow, husband or next of kin * * * resident in the State, entitled, competent, or willing to take out letters of administration," was limited by the provision of the act of 1877 (Chap. 883, Laws of 1877) conferring upon the Brooklyn Trust Company the capacity to act as executor or administrator, and upon courts and surrogates the power to issue letters of administration to it upon application of a party interested. *In re Goddard.* 544

2. The said provision of the act last mentioned is permissive, not mandatory. *Id.*

3. The discretionary power so given was, however, so far as it relates to the county of Kings, taken away by the provisions of the act of 1882 (Chap. 124, Laws of 1882), providing that the public administrator of that county shall have the prior right to administration in the cases above specified. *Id.*

4. The verification to a petition upon which a citation was issued by a surrogate, requiring an executor to show cause why he should not file an inventory, render and settle his accounts and pay a legacy, stated that the petitioner "knows the contents thereof, and that the same are true." *Held*, that this was equivalent to saying that they are true, to the knowledge of deponent; and so that there was a substantial compliance with the provisions of the Code of Civil

Procedure. (§§ 2534, 526.) *In re Macaulay.* 574

5. The executor was a non-resident. The surrogate made an order directing service of the citation either personally without the State or by publication. Less than six weeks intervened between the day the citation was issued and the day named therein for the return thereof. It was served personally in another State more than thirty days before the return day. *Held*, that the service was sufficient (Code, § 2525); that as service by publication was not resorted to, it was not requisite that the six weeks required for publication should intervene, nor was it necessary to publish the citation in the State paper, as that is only required when service is by publication. (§ 2536.) *Id.*
6. An answer of an executor to a petition requiring him to pay a legacy, which simply denies the validity or legality of the petitioner's claim, is not sufficient to require the surrogate to dismiss the petition; it must also set forth facts showing that the claim is doubtful. *Id.*
7. The provision of the said Code, requiring the surrogate to dismiss such a petition when it is not proved to the satisfaction of the surrogate that there are assets applicable to the payment of the claim of the petitioner, which may be so applied without injuriously affecting the rights of others (§ 2718, subd. 2), does not require a reference to that subject in the petition, or that proof shall be made before the issuing of an order requiring an accounting; but upon return of the citation, if issued upon a petition showing the petitioner to be entitled to a legacy, and that more than a year has elapsed since letters testamentary were issued (§ 2717, subd. 2), the surrogate is authorized to make the order requiring the executor to account (§ 2723, subd. 3); and when that is complied with, if the surrogate is not satisfied that there are in the hands of the executor

assets properly applicable to the payment of the petitioner's claim it is his duty to dismiss the petition. *Id.*

FALSE IMPRISONMENT.

1. A person called at defendant's residence and falsely stated that certain chemical works, belonging to a company of which defendant was a director, had been destroyed by an explosion, and that he had been sent as a messenger by the manager; also that the latter had neglected to provide him with money to pay his expenses back, and at his request defendant gave him \$5 for that purpose. Defendant, supposing plaintiff to be the person, caused his arrest without a warrant. In an action for false imprisonment, *held*, that the offense committed, by the pretended messenger, was not a larceny, but the obtaining of property by false pretenses, and so was not a felony; and that the arrest was illegal. *Thorne v. Turck.* 90
2. The complaint contained a separate cause of action for malicious prosecution. A motion by defendant's counsel to dismiss the complaint as to that cause of action was denied; as to it, however, the jury found for defendant, but rendered a verdict for plaintiff upon the first cause of action. *Held*, that the denial of the motion, even if erroneous, could have had no injurious effect, and so was not ground for reversal. *Id.*
3. After an arrest of a judgment debtor, under a body execution unlawfully issued, the judgment creditors notified the sheriff that they "countermanded" the execution, and the latter thereupon informed the prisoner that he had been directed to discharge him if he would sign a stipulation not to sue for false imprisonment, and upon the prisoner's refusal assured him that if he did not sign it "he would have to stay in jail a long time." The prisoner then signed and was discharged. In an

action for false imprisonment, *held*, that the release was void for duress and so furnished no defense. *Guilleaume v. Rowe*. 268

FALSE PRETENSES.

A person called at defendant's residence and falsely stated that certain chemical works, belonging to a company of which defendant was a director, had been destroyed by an explosion, and that he had been sent as a messenger by the manager; also that the latter had neglected to provide him with money to pay his expenses back, and at his request defendant gave him \$5 for that purpose. Defendant, supposing plaintiff to be the person, caused his arrest without a warrant. In an action for false imprisonment, *held*, that the offense committed by the pretended messenger was not a larceny, but the obtaining of property by false pretenses, and so was not a felony; and that the arrest was illegal. *Thorne v. Turck*. 90

FINDINGS OF LAW AND FACT.

1. It is the duty of this court to harmonize the findings of a trial court so as to arrive at the real intention, if it can be done, and an intention to reverse a deliberate finding will not be imputed because of collateral findings in which an inadvertent or immaterial expression is used. *Bennett v. Bates*. 354
2. In an action upon a bond the defense was that a mortgage was given as security for its payment; that defendant conveyed the mortgaged premises subject to the payment of the mortgage, and was discharged by an agreement made, without his assent or knowledge, between the plaintiff and the grantee, whereby in consideration of the payment by the latter of \$500 of the principal and the interest unpaid, the former extended the time of payment of the residue. The trial court found the facts as alleged in the answer, and directed

a dismissal of the complaint; there was no finding or request to find as to the value of the land at the time of the extension, and on appeal to this court the evidence was not returned. *Held*, it was a fair inference from the facts found, that the value of the land equaled the amount of the mortgage debt; and that it might properly be assumed in support of the judgment. *Murray v. Marshall*. 611

FORECLOSURE.

1. The rule that one who has purchased and received a conveyance of a portion of mortgaged premises may require that all of the balance shall first be sold to satisfy the mortgage, before resort shall be had to his portion, applies, although part of the residue is situated in another State. *Welling v. Ryerson*. 98
2. J. executed a mortgage upon his farm, a portion of which was situated in this State, the residue in New Jersey; he subsequently conveyed to R. five acres of that portion situate in this State, and thereafter executed another mortgage upon the whole farm. The owner of the two mortgages commenced foreclosure suits, one in this State to foreclose the first mortgage, another in New Jersey to foreclose both. In the first suit judgment was rendered, directing sale of the land in this State, without reference to that in New Jersey, and providing that the portion not sold to R. should be first sold. Pending proceedings to enforce the judgment, the grantee of R. tendered to the plaintiff in the foreclosure suit the amount due on his mortgage, with costs, and demanded an assignment of the mortgage, or a release of his land, which was refused. In an action brought to compel such assignment, *held*, that said grantee was entitled to the relief sought; and, it appearing that the two foreclosure judgments had been executed by sale of all of the farm, save that sold to R., and that the amount realized therefrom was more than

sufficient to pay the first mortgage, with all costs of foreclosure and sale, that R.'s grantee was entitled to have his land released and discharged from any liability. *Id.*

3. Three persons, who had jointly indorsed the notes of a manufacturing corporation, entered into a written agreement with each other to the effect that if the corporation should fail to pay said notes at maturity they would each pay one-third of the amount unpaid, and in case of failure of either to pay his proportion, and either of the others should pay more than his share, the one so paying should "have and recover from the one so failing an amount equal to his aliquot part." It was also agreed that each of the parties should execute, to a trustee named, a mortgage as security for the performance of his agreement; and it was provided that in case of failure of one of the parties to pay his share of the unpaid paper, "and which either of the parties shall have paid in whole or in part, then and in that case the said trustee is empowered, and it shall be his duty, at the request of the parties so having paid, to foreclose the mortgage made by the party" so failing to pay. Mortgages were executed as required; each stated that it was given to secure the payment of \$25,000, according to the conditions of the agreement. The corporation made default in the payment of certain of the notes. In an action brought by the trustee and the holders of certain of said notes to foreclose one of the mortgages, it was shown that the corporation and the indorsers were insolvent, and that nothing had been paid upon said notes by any of the parties. *Held*, that the trust was not created for the benefit of the creditors, but solely for that of the parties to the agreement; that it imposed no primary liability upon the latter; and that the holders of the notes were not entitled to be subrogated to the rights of the indorsers in the securities also that the action could not be maintained, as there had been no

breach of the condition of the agreement, authorizing a foreclosure, as neither of the other parties thereto had paid any portion of the sum which the mortgagor was thereby bound to pay. *Seward v. Huntington.* 104

4. Also *held*, that one who had purchased the mortgaged premises upon foreclosure of a junior mortgage, executed by the same mortgagor, the foreclosure suit having been brought prior to the adoption of the last seven chapters of the Code of Civil Procedure, succeeded to the rights of the mortgagor (3 R. S. 192, § 158), and was entitled to come in and defend. *Id.*
5. The complaint in an action to foreclose a mortgage alleged that the mortgage, with accompanying bond, was executed and delivered to the mortgagees named, to secure the payment of \$4,000, and that it was duly assigned and transferred to plaintiff; the answer admitted the execution of the securities as alleged, and the due assignment thereof to the plaintiff, but averred that they were made in pursuance of an usurious agreement with the plaintiff. The trial court found the usurious agreement substantially as alleged, and that the bond and mortgage was never delivered to, or in the possession of, the mortgagees. *Held*, that in the absence of any waiver of the admission in the pleadings, this last finding was error. (Code of Civil Procedure, § 522.) *Dunham v. Cudlipp.* 129
6. The usurious agreement, as alleged and found, was in substance that the mortgagor should execute the bond and mortgage in question to the mortgagees named, who were creditors of his, and another mortgage of \$3,000 to other creditors; which mortgages should be assigned to plaintiff, he paying therefor the sum of \$8,000. It appeared that plaintiff was informed that the mortgagor did owe the mortgagees the sum of \$7,000; that they had agreed to take such security, and would receipt for the amount thereof, and he could pur-

- chase the mortgages for the sum specified. The securities were executed, and plaintiff paid, upon assignment thereof to him, the sum agreed, of which sum the mortgagor paid to the mortgagees \$5,000, the mortgagees named in the mortgage in suit receiving \$3,000. The assignment contained a covenant that the full sum of \$4,000 "is secured, owing and unpaid on account of said mortgage." The mortgagor also made a written statement that the mortgage was given to secure the payment of the sum named, that it was due, and that no defense existed. *Held*, that the defense was not sustained; that the bond and mortgage, on delivery to the mortgagees, became valid securities in their hands, and could be sold by them at any price, without imputation of usury. *Id.*
7. But, *held*, that if in fact the real debt owing to the mortgagees was less than the sum named in the mortgage, they could not, nor could plaintiff, enforce it for more than the amount of the debt. *Id.*
8. In an action to foreclose a mortgage executed by one in possession and holding the legal title, but who acquired title by fraud, it appeared that the land had been reconveyed to the original owner by the fraudulent purchaser and that the former had, after the reconveyance, and in ignorance of the plaintiff's mortgage, made payments upon a mortgage which was a lien upon the premises at the time of the conveyance by her. *Held*, that she was entitled to be subrogated to an interest in the prior mortgage equal to the sums so paid. *Simpson v. Del Hoyo.* 189
9. The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure was inherent in the Court of Chancery before the adoption of the Code of Procedure; it was continued by that Code (Subd. 5, § 244), and is not abrogated by the provision of the Code of Civil Procedure (§ 713), defining cases in which receivers may be appointed; but on the contrary is reaffirmed by the general provision of said Code (§ 4) declaring that each of the courts therein named "shall continue to exercise the jurisdiction and powers now vested in it * * * except as otherwise prescribed." *Hollenbeck v. Donnell.* 342
10. Where, however, it appeared that but about one-sixth of the mortgage debt was due, and that the premises were divided into two nearly equal parcels, which could be sold separately without injury to the parties interested, *held*, that assuming the appointment of a receiver of the rents and profits was proper, in the absence of a specific pledge thereof plaintiff was not entitled to a receivership for the protection of that portion of the debt not yet due, or of that portion of the premises as to which his rights to sell had not accrued; and so, was not entitled to a receivership of the whole, but only of one of the parcels. *Id.*
11. Defendant S. purchased for \$15,000 certain premises, upon which she held mortgages amounting to \$11,400. She agreed to give her bond with a mortgage on the premises to secure the purchase-price, from which was to be deducted the amount of her mortgages; these were satisfied and surrendered on receipt of the deed, but a mortgage was presented to her for execution, prepared by the grantee's attorney, for the full amount of the purchase-price, which she executed and delivered in ignorance of the fact that the deduction agreed upon had not been made. There was no special agreement that her mortgage should be given simply for the balance, but she supposed that the amount due her had been or would be deducted. This mortgage was assigned on the day of its execution by the mortgagee to H., his attorney, and by the latter with a guaranty of payment to plaintiff, without any indorsement of payment thereon. In an action to foreclose the said mortgage, *held*, that the satisfaction and delivery

by S. of the bonds and mortgages held by her operated as a payment upon the mortgage in suit; that the omission to indorse such payment did not affect her right to claim it; and that she was entitled to the benefit of the payment, even as against a *bona fide* purchaser. *Bennett v. Bates.* 354

12. S. sold and conveyed the premises to defendant B., subject to the payment of the mortgage, "if (as was stated in the deed) there shall be found any thing owing and unpaid upon the same." The evidence showed that the whole amount of the mortgage was deducted from the purchase-price. *Held*, that this fact alone did not charge the land with the payment of the full amount; and as the deed disclosed a clear intention on the part of the grantor to convey her interest in the land, and subject it only to the payment of the sum actually owing on the mortgage, this justified a finding to that effect, and such a finding having been made, that the grantee was entitled to the benefit of the payment. *Id.*

13. B., with knowledge of the facts, paid to plaintiff \$1,050 specifically as one year's interest on the mortgage. *Held*, that while B. was not estopped by such payment from questioning the validity of the mortgage debt, yet, as it was a voluntary payment upon a disputed claim, she was not entitled to have the excess of the sum paid over the interest actually due applied generally as a payment upon the mortgage. *Id.*

— *Where on foreclosure sale the referee was directed to pay out of proceeds of sale the amount of any liens for assessments, etc., held, that conceding the purchaser took title subject to any such liens, it only applied to valid liens, and that he could maintain ejectments against one in possession claiming under a sale upon an illegal assessment.*

See Simms v. Voght. (Mem.) 654

FOREIGN CORPORATIONS.

1. The C. W. R. R. Co., a Connecticut

corporation, in pursuance of the laws of that State, to secure certain bonds issued by it, executed to the State treasurer a mortgage, which, by its terms, covered all the railway lands and personal property then or thereafter belonging to said corporation, and all its rights and franchises under its charter. Default having occurred in payment of interest as provided for by the bonds, the corporation formally surrendered its property to plaintiff as such trustee. Defendant, as sheriff, by virtue of an attachment issued in an action brought in this State against said corporation, levied upon certain of its personal property found here. In an action to recover possession thereof, *held*, that the bonds having been issued by the State comptroller as required by the law of Connecticut, and being valid upon their face, plaintiff was not bound to show that the provisions of law authorizing their issue had been complied with, but the burden was upon defendant to show their invalidity; also that if any of the conditions precedent to taking of possession had not been complied with, these had been waived by the corporation by voluntarily surrendering possession; and that defendant could not insist upon them. *Nichols v. Mase.* 160

2. Said corporation held a lease of part of the road of another railroad company in this State; this was in the possession of defendant, and was replevied. *Held*, that plaintiff was not entitled to recover the same in this action; that a lease of itself was not the subject of replevin. *Id.*

3. The provision of the Revised Statutes (1 R. S. 593, § 9), prohibiting preferences by insolvent corporations, does not apply to foreign corporations. *Coats v. Donnell.* 163

FOREIGN LAWS.

— *In actions commenced prior to Code of Civil Procedure, the statute of*

limitations of another State no defense.
See Clark v. L. S. & M. S. R. Co. 217

FORMER ADJUDICATION.

1. Where premises have been conveyed absolutely to secure a loan, and because of a refusal on the part of the lender to reconvey on tender of the amount due, the borrower brings an action to compel a reconveyance, he cannot, after judgment in his favor in such an action, maintain another action to recover, as damages, the amount of a depreciation in the value of the property pending the litigation, or his costs and expenses in the equity suit; conceding an action to recover damages may be maintained, as to which *quære*, these are not proper items of damages. *Marvin v. Prentice.* 295
2. As to whether the judgment in the equity suit would be a bar to an action for damages, *quære. Id.*
3. In an action upon a judgment recovered by plaintiff against defendant in another State, defendant set up as a counter-claim an alleged loan by him to plaintiff of \$12,500. It appeared that in the former action, which was for money loaned, defendant denied the loan, and set up as a defense and gave evidence on the trial thereof tending to show that he advanced the money set up as a counter-claim to one to whom plaintiff was indebted, and who held title to certain lands as security therefor, under an agreement that the land should be conveyed to defendant, to be held as security, and to be conveyed to plaintiff on payment of the loan, and that the alleged loans made by plaintiff were simply payments. Plaintiff, on the other hand, gave evidence to the effect that his interest in the land was sold absolutely to defendant, who paid the \$12,500 as the purchase-price and received a deed from the one holding title. *Held*, that the question whether the \$12,500 was a

loan was necessarily involved in, and determined by the former action, and the judgment therein was conclusive; also that the fact that the matter was set up as a defense in the former action, not as a counter-claim, was immaterial. *Patrick v. Shaffer.* 423

FRAUD.

1. As the act of 1879 (Chap. 542, Laws of 1879), amending the provisions of the Code of Civil Procedure (§ 549) in reference to arrest, by authorizing an arrest in an action on contract where fraud is alleged in the complaint, and declaring that where such an allegation is made, plaintiff cannot recover without proving fraud, by its terms (§ 2), does not apply to actions theretofore commenced, it is not essential in such an action where the defendant has been arrested on affidavits charging fraud, to amend the complaint by inserting therein allegations of fraud, nor is it necessary to prove the fraud on the trial. *Humphrey v. Hayes.* 594
2. An assignment of a mortgage contained a covenant that the assigned mortgage was the first lien upon the mortgaged premises. *Held*, that proof of knowledge on the part of the assignors of the existence of the other mortgage was not sufficient to sustain a finding of fraud. *Id.*

FRAUDULENT CONVEYANCES.

1. In an equity action brought to set aside alleged fraudulent conveyances made by a judgment debtor, the defendant is not entitled to a jury trial. The court may frame issues and direct them to be tried before a jury, but this is in its discretion, and its determination is not the subject of review. *Wright v. Nostrand.* 31
2. Where the alleged fraudulent conveyances were of the debtor's real estate to his wife, and the judgment set them aside, *held*, an objection to such judgment, that it

did not provide for the wife's right of dower, could not be raised on appeal; that the remedy, if any, was by motion. *Id.*

3. *It seems* that it is competent for a receiver, appointed in supplementary proceedings, to bring an action either to set aside and annul alleged fraudulent conveyances of his real estate by the debtor, and for a reconveyance of the property by the fraudulent grantee, or to set aside the conveyances as a cloud on title so as to subject the property to levy and sale on execution. *Id.*

GENERAL TERM.

1. The General Term of the Supreme Court has no authority on appeal to determine the amount of unsettled damages; at least where no facts are found below upon which an estimate as to the true amount can be made. *Andrews v. Tyng.* 16
2. Accordingly *held*, where on trial before a referee in an action for attorney's services wherein the defendant set up a breach of the contract of employment on the part of plaintiffs, and the referee found the breach, but allowed only nominal damages, and where the General Term decided this to be erroneous and that defendant was entitled to substantial damages, that it was error for the General Term to fix the damages; that it only had authority to order a new trial, so that the amount of damages might be determined by a trial court. *Id.*

GRANTOR AND GRANTEE.

1. Where a conveyance of real estate, purporting to be an indenture and containing a clause by which the grantee assumes and agrees to pay a mortgage upon the lands conveyed, has been accepted by the grantee, it will, for the purpose of a remedy against the grantee, be considered as the deed of both parties, and the clause as a covenant. *Bowen v. Beck.* 86

2. *It seems*, the grantee, in a conveyance by deed-poll containing a mortgage assumption clause, upon acceptance of the deed, becomes bound as covenantor to pay the mortgage. *Id.*

3. *It seems* that where a conveyance of land is made subject to the payment of a mortgage thereon, but without an express covenant on the part of the grantee to pay, the disability thus imposed upon him, which prevents him from disputing the validity of the mortgage, may be removed by the grantor by conferring upon the former the right to question the mortgage which the original conveyance withheld. *Bennett v. Bates.* 354

4. The mere deduction of the amount of a mortgage from the purchase-price on sale of the lands does not, in the absence of an agreement to pay, absolutely impose upon the grantee the duty of paying or suffering his land to be taken in payment of the mortgage. While it is evidence of the grantor's intention to subject the land to such payment it is not controlling or conclusive; it may be inferred that the deduction was made to protect the grantee against a questionable incumbrance. *Id.*

5. Although where an obligor and mortgagor sells and conveys the mortgaged premises subject to the mortgage, but with no covenant on the part of the grantee to pay, no technical relation of principal and surety arises between them, yet as the land is the primary fund for the payment of the debt, in respect thereto and to the extent of its value the grantee stands in the relation of a principal debtor, and the grantor has an equity similar to that of a surety. *Murray v. Marshall.* 611

6. Where, therefore, in such case the holder of the bond and mortgage by a valid agreement with the grantee, and without the assent or knowledge of the grantor, extends the time of payment of the mortgage, to the extent of the value of

the land at the time of the agreement, the latter is discharged from liability upon his bond; to that extent the creditor practically takes the land as his sole security and assumes the risk of collecting that amount out of it. *Id.*

GUARANTY.

1. Defendants guaranteed the payment of all drafts drawn by A. upon the A. G. Co. during a period ending July 31, 1879, provided the amount guaranteed should not at any one time exceed \$18,000; the guaranty to be continuous, and upon payment of any draft, to be in full force as to any others until payment of the last draft drawn during the period named. A. drew a draft for \$18,000, and subsequently another for \$8,000, neither of which was paid at maturity. In an action upon the guaranty the complaint averred the non-payment of the first draft. Defendants alleged and gave evidence tending to show a payment made after the commencement of the action of \$3,144; more than a year thereafter it was credited by plaintiff against the \$8,000 draft. *Held*, that plaintiff had the right to so credit it; but that even if this were otherwise, as if credited upon the first draft the guaranty would then attach to so much of the second, no harm was done defendants by the application, and if none had been made, such an application by the court would have been just and equitable, and would have been sanctioned by established rules. *B'k of California v. Webb.* 467

2. In an action upon a guaranty of payment in an assignment of a bond and mortgage for \$1,250 it appeared that at the time of the assignment there was another mortgage upon the premises, bearing the same date and recorded at the same time as the assigned mortgage. The holder of the other mortgage obtained a decree of foreclosure thereon, which plaintiff purchased for the sum of \$669.65; the mortgaged premises were sold under the decree to plaintiff for

\$100. The defendants were not parties to the foreclosure and it did not appear that they had any knowledge of the foreclosure or the sale. The value of the premises at the date of the assignment was \$3,000, and at the time of sale \$1,500. *Held*, that as the acts of plaintiff were injurious to the rights of the guarantors they were thereby discharged, either wholly or to the extent to which the security was impaired, i. e., the proportionate part of the value of the mortgaged premises at the time of sale, applicable upon the guaranteed mortgage. *Humphrey v. Hayes.* 594

3. *It seems* that the assignee in such a case is not bound to exercise diligence, and until required by the guarantor to enforce his bond and mortgage, delay in so doing, and a consequent impairment of the security, is no defense. He is not at liberty, however, to do any affirmative act impairing the security; the guarantor on payment is entitled to enforce the mortgage for his own indemnity, and any act of the assignee which operates to deprive him of that indemnity discharges him. *Id.*

GUARDIAN AND WARD.

1. Under the will of D., his widow took a fee in certain real estate, determinable upon her remarriage, and plaintiff, an infant, a contingent fee, depending upon the happening of that event. Proceedings were instituted under the statute for a sale of plaintiff's interest, in which defendant T., the executor of the will of D., was appointed special guardian for plaintiff; the proceedings resulted in a sale; T., as special guardian, and the widow executed a conveyance to the purchaser, who executed to T., as such guardian, a mortgage upon the lands for part of the purchase-money. T. foreclosed the mortgage, bidding in the lands, and receiving a conveyance in his own name, but paying no portion of the purchase-money; he executed a mortgage on the

lands to defendant S., to secure a judgment recovered against him as executor. The widow subsequently remarried. In an action brought to compel the transfer of the title to, or in trust for, plaintiff, and a cancellation of the mortgage, *held*, that plaintiff was entitled to the relief sought; that conceding the court had no jurisdiction to direct the sale of plaintiff's interest, and so that the title was not divested, the court in directing the sale necessarily adjudged that the case was within the statute, and the conveyance to T. embarrassed plaintiff's title; that the action being brought to redress a violation of trust, defendants would not be permitted to defeat it by a suggestion that the apparent title so acquired may not, if allowed to stand, be effectual to divest plaintiff of her title. *Dodge v. Stevens*. 209

2. An action to recover money or personal property belonging to an infant may be brought in the name of the infant by his guardian *ad litem*, although he has a general guardian. While the statute gives to the latter the custody and management of the infant's personal estate (2 R. S. 150, § 3), the beneficial interest is in the infant and he may maintain the action. (Code of Civil Procedure, § 468.) *Segelken v. Meyer*. 478

HIGHWAYS.

1. The provisions of the Revised Statutes relating to town line roads (1 R. S. 516, §§ 73, 74, 75) do not provide for the maintenance of bridges, and the road districts therein mentioned do not include bridges; they simply refer to ordinary road districts, and were intended to provide only for ordinary highway labor. *Day v. Day*. 153
2. A bridge, therefore, upon a town line road, which is located partly in each of the towns is not to be considered as wholly within the town to which the road district including it has been allotted under said provisions; but the towns are jointly liable for the expense of maintaining it. *Id.*
3. The commissioner of highways of one of the towns so liable may waive the twenty days written notice required to be given by the act providing for the maintenance of such bridges (§ 1, chap. 225, Laws of 1841, as amended by chap. 383, Laws of 1857), and where, upon application of the commissioner of the other town, he absolutely refuses to help rebuild the bridge, when it becomes necessary, he thereby waives notice, and the latter may rebuild and then maintain an action against the former to recover half the expense. *Id.*
4. The setting out of trees or the building of a sidewalk in a highway by the owner of adjoining lands, as authorized by the act of 1863 (Chap. 93, Laws of 1863), is not such an occupation as can be made the foundation of a claim to title by adverse possession as against the true owner. *Bliss v. Johnson*. 235
5. While in some cases, in order to charge an officer, upon whom is imposed the duty of keeping a street in repair, with damages resulting from a defect in the street, it is necessary to show that he had adequate means in his hands to make the repairs such proof is not necessary in a case of *misfeasance*, i. e., when the officer has acted, but negligently, to the special injury of plaintiff. *Bennett v. Whitney*. 503
6. In an action against city officers to recover damages for alleged negligence in leaving unguarded and unlighted an opening temporarily made in a street, *held*, that a provision in the city charter (§ 6, title 14, chap. 291, Laws of 1867), declaring its officers liable for all damages "sustained by reason of willful neglect" did not take away or affect the common-law liability of an officer for simple negligence. *Id.*

— In action for diverting water from plaintiff's dam, defendant cannot object that the stream is a high-

way and the dam an unlawful obstruction thereof.

See Groat v. Moak.

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HOTELS.

See INNS.

INFANTS.

1. An action to recover money or personal property belonging to an infant may be brought in the name of the infant by his guardian *ad litem*, although he has a general guardian. While the statute gives to the latter the custody and management of the infant's personal estate (2 R. S. 150, § 3), the beneficial interest is in the infant, and he may maintain the action. (Code of Civil Procedure, § 468.) *Segelken v. Meyer.* 478

2. Plaintiff's father died intestate; his mother was appointed administratrix and also general guardian for the infant children, five in number. A settlement of the accounts of said administratrix was had and a final decree entered by the surrogate fixing the shares of the infants; subsequently two of them died intestate. Defendant was the attorney, counsel and proctor for the widow, and as such received moneys belonging to the estate. Upon an accounting he gave to the widow a written acknowledgment stating that there was due to her, as guardian for the three surviving children, the sum of \$1,500, payable according to the surrogate's decree, interest thereon to be paid semi-annually. Subsequently the widow died and K. was appointed by the surrogate general guardian of the plaintiff, who, being still an infant, brings this action by said K. as his guardian *ad litem*, duly appointed for that purpose to recover his share. *Held*, that the action was well brought, and that a good cause of action was shown for \$500; that the acknowledgment was an admission that the money belonged to plaintiff and had been held by his general guardian in trust for

him; and, even if not originally collected and received by defendant for plaintiff, but paid over to him by said guardian, as he had knowledge that it was a trust fund, he received it impressed with the same trust, and plaintiff's share therein having been ascertained and agreed upon, he could follow the fund and maintain an action for his share. *Id.*

3. The acknowledgment also stated that defendant was indebted to the widow as next of kin of the two deceased children in the sum of \$1,000. It was admitted that this sum was due the widow and the three surviving children as next of kin, she in her own right and as guardian for them being entitled to receive it; it also appeared that defendant had promised plaintiff's attorney to pay his share, and raised no objection because of the non-appointment of an administrator. *Held*, that in the absence of proof that administration upon the estates of the deceased children had been granted, plaintiff was entitled to recover in this action his share (one-fourth) of said sum. *Id.*

INJUNCTION.

A trespasser upon real estate may not invoke the aid of a court of equity to preserve to him the fruits of his wrong, by restraining the party who was in possession from resuming his lawful occupation which was taken from him by the trespasser. *Littlejohn v. Attrill.* 619

INNS.

1. Persons belonging to the army and navy, who have no permanent residence they can call home, are to be regarded as travelers when stopping at public inns; to deprive them of their privileges as such, and to give them the character of boarders merely, it must appear that an explicit contract was made to that effect. *Hancock v. Rand.* 1

2. Plaintiff and her husband H., who was an officer in the United States

army, having no permanent home, but living where military duty called him, occupied rooms in the defendant's hotel under an agreement, by which they were to so occupy, upon terms specified, until the spring or summer following, provided every thing was satisfactory, and the husband was not sooner ordered away on military duty. H. and family took their meals at the hotel restaurant, paying for each meal the same as other guests. No notice was posted in said rooms as prescribed by the Innkeepers' Act (Chap. 421, Laws of 1855). In an action to recover the value of property of plaintiff, stolen from said rooms while so occupied, *held*, the facts justified a finding that the relation between the parties was that of innkeeper and guest; and so that defendants were liable. *Id.*

8. It appeared that defendants kept separate apartments for boarders and for transient persons, and that H. and family were registered among the former. *Held*, in the absence of proof that H. was aware of this fact, defendants' liability was not affected thereby. *Id.*

4. It appeared that H. and family for several years prior to their going to defendants' hotel had been boarding at another hotel in the same city. *Held*, that this did not affect the question of their relationship with defendants, or establish that they were citizens of that city. *Id.*

INSOLVENT CORPORATIONS.

—Court has discretion to grant or refuse motion of purchaser at a sale by a receiver of insolvent Life Insurance company, to compel the receiver to complete the sale.

See *In re Atty.-Gen. v. C. L. Ins. Co.* 199

See INSOLVENCY.

INSOLVENCY.

1. Proof that at the time of a transfer or assignment by a corporation

it was in fact insolvent is not conclusive evidence that the transfer or assignment was made "in contemplation of the insolvency of such company," within the meaning of the statute (1 R. S. 603, § 4) declaring such a disposition of its property unlawful and void; to come within the prohibition of the statute the act must have been done because of existing or contemplated insolvency. *Paulding v. Chrome Steel Co.* 334

2. Money was loaned to a corporation in 1874 under an agreement with it that payment should be secured by chattel mortgage. A mortgage was accordingly executed by the president and secretary of the corporation, with the actual assent of the stockholders, but without the filing of a written assent in the county clerk's office as required by the act of 1871. (Chap. 481, Laws of 1871.) In 1879, the debt remaining unpaid, the formal assent of the stockholders was given and filed as required by said act and the act of 1878 (Chap. 163, Laws of 1878), and a new mortgage was executed in lieu of the former one, and in pursuance and fulfillment of the original agreement. At this time the corporation was insolvent. *Held*, the evidence did not authorize a finding that the mortgage was given in contravention of the statute. *Id.*

3. As to whether any but the stockholders of a corporation can complain that the statutory condition was not complied with, *quære*. *Id.*

INSURANCE (LIFE).

Held, that a receiver of a life insurance company, appointed under the act of 1869 (Chap. 902, Laws of 1869), and who entered upon the performance of his duties prior to 1883, was entitled to have his compensation fixed by the superintendent of the insurance department, as provided by said act (§ 18), and that he was entitled to a *mandamus* to compel the superintendent to so fix his commissions. *People, ex rel. Newcomb, v. McCall.* 587

— *Court has discretion to grant or refuse motion of purchaser at a sale by a receiver of insolvent life insurance company to compel the receiver to complete the sale.*

See In re Att'y-Gen'l v. C. L. Ins. Co. 199

INTEREST.

1. A mortgage was executed May 10, 1876, the principal was made payable May 10, 1881. In an action to foreclose the mortgage, *held*, that plaintiff was entitled to interest at the rate of seven per cent up to the latter date, and at six per cent thereafter. *Bennett v. Bates.* 854

2. Where interest is allowed, not by virtue of any contract to pay it, but simply as damages because of default in the discharge of an obligation, the legal rate of interest must govern. *Sanders v. L. S. & M. S. R. Co.* 641

3. Where, therefore, in an action to require defendant to declare and pay dividends on certain preferred and guaranteed stock, it appeared that the dividends were due and payable prior to January 1, 1880, when the act (Chap. 588, Laws of 1879) fixing the rate of interest at six per cent went into effect, *held*, that plaintiff was entitled to interest at the rate of seven per cent up to that date, and six per cent thereafter. *Id.*

JOINT LIABILITY.

Satisfaction by one joint tortfeasor is a bar to an action against another; so a partial satisfaction by one is proper to be shown by another in mitigation of damages. *Knapp v. Roche.* 839

JUDGMENT.

— *An order of General Term affirming an interlocutory judgment is not appealable*

See Raynor v Raynor. 248

JUDICIAL NOTICE.

The courts may take judicial notice

of the system of checking baggage by railroad companies, and of the general practice, in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of its route to the next succeeding carrier, and so on until it reaches the possession of the last carrier. *Isaacson v. N Y. C. & H. R., etc.* 278

JUDICIAL SALES.

1. It is within the discretion of the court to grant or refuse the application of a purchaser, at a sale, by a receiver of an insolvent insurance company, for an order requiring the receiver to complete the sale. The contract, while executory, is subject to the supervisory power of the court. The purchaser by making the application submits himself to its jurisdiction, and if in its judgment the contract is inequitable, it may deny the motion. *In re Attorney-General v. Cont'l L. Ins. Co.* 199

2. Where, therefore, on such a motion it appeared that the petitioner bid off certain shares of bank stock of the par value of \$27,000 for the sum of \$107; that it was known to the purchaser, but not to the receiver at the time of the sale, that in an action brought by certain stockholders of the bank, in behalf of themselves and the other stockholders, against its directors, it had been adjudged that, because of misconduct, the directors were liable to the stockholders for the market value of the stock, at a time specified, and also for an assessment of one hundred per cent, which had been paid by the stockholders, — *held*, that the court properly refused to grant the motion; that although there was no technical legal duty resting upon the purchaser to disclose his knowledge, and even if the receiver was chargeable with negligence, the court was not bound to direct a completion of the sale. *Id.*

JURISDICTION.

The court has no power, on motion of a party defendant, to strike out all the allegations of the complaint referring to himself, simply because they are irrelevant to an alleged cause of action against some other defendant; neither the question as to whether the moving party was properly made a defendant, nor the question as to whether the facts alleged make out a good cause of action as to him, can be raised on such a motion. *Hagerty v. Andrews*. 195

KINGS (COUNTY OF).

— *Public administrator in.*
See In re Goddard. 544

LANDLORD AND TENANT.

1. A tenant cannot by a disclaimer, or by mere words denying his landlord's title and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. The possession of the tenant and of his grantees and assigns is that of the landlord, and not hostile or adverse; and this is so as to a grantee who has taken a deed of the fee in ignorance of the fact that his grantor stood in relation of tenant, the latter denying any such relation. *Whiting v. Edmunds*. 309
2. The possession of the tenant, thus in subordination to the title of the landlord, continues, not only during the term, but is presumed to remain unchanged until twenty years after the termination thereof, and notwithstanding any claim of the tenant or his successors to a hostile title. (Code of Civil Procedure, § 373.) *Id.*
3. To rebut this presumption and initiate an adverse holding, the tenant must do something equivalent to a surrender of possession to the landlord, and bring home to him knowledge of the adverse claim. *Id.*

4. Under the act of 1860 (Chap. 345, Laws of 1860) releasing the lessee of a building from liability for rent after injury to the building, without his fault or neglect, rendering it untenable, "unless otherwise expressly provided by written agreement," to deprive a tenant of the benefit of the statute, there must be an express written agreement on his part indicative of an intent to waive such benefit. *Pann v. Rouse*. 401

5. A lease contained a provision "that in case the tenant shall abandon the premises at any time, the rent then due or to become due" shall be due and collectible. *Held*, that this was not such an agreement. *Id.*

See LEASE.

LARCENY.

1. H. M. Cutter & Co., cotton brokers, falsely and fraudulently represented to plaintiffs that they had orders from the F. M. Co. to purchase for it one hundred bales of cotton, and relying thereon, plaintiffs contracted to sell that quantity to the corporation named. Bought and sold notes in the usual form were delivered by plaintiffs' brokers, in which the sale was stated to have been made to said corporation. The notes contained the following: "Payment guaranteed by H. M. Cutter & Co. Bill to H. M. Cutter & Co." No bill, warehouse receipt or other muniment of title was in fact delivered to Cutter & Co. The cotton was delivered to that firm to be delivered to the supposed purchaser; they placed it in a warehouse, obtained advances upon the warehouse receipts, and it was subsequently sold to *bona fide* purchasers. *Held*, that the transaction, by means of which Cutter & Co. obtained possession, was a larceny. *Hentz v. Miller*. 64
2. To constitute the crime of larceny there must be both a trespass and a felonious intent; where the

owner of property, although induced by false pretenses, parts with possession, intending to surrender absolutely his title thereto, it is not larceny. *Thorne v. Turck.*

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3. A person called at defendant's residence and falsely stated that certain chemical works, belonging to a company of which defendant was a director, had been destroyed by an explosion, and that he had been sent as a messenger by the manager; also that the latter had neglected to provide him with money to pay his expenses back, and at his request defendant gave him \$5 for that purpose. Defendant, supposing plaintiff to be the person, caused his arrest without a warrant. In an action for false imprisonment, *held*, that the offense committed by the pretended messenger was not a larceny, but the obtaining of property by false pretenses, and so was not a felony; and that the arrest was illegal. *Id.*

LEASE.

1. In an instrument purporting to be a lease, executed by plaintiff as lessor, various persons named, including the defendants, describing themselves as the officers of a corporation named, were designated as "party of the second part," i. e. lessee. The demise was to the parties of the second part, and their successors in office. They, as such officers, covenanted on behalf of "themselves, and their successors in office," to pay the rent specified. The defendants signed and sealed the instrument in their individual names; the corporate seal was not attached. In an action in which defendants were sought to be charged individually for the payment of rent due, it appeared that the contract was recognized and ratified, both by the corporation and plaintiff, as the contract of the corporation; it took possession of the demised premises, and paid rent upon demand by plaintiff of its treasurer. *Held*, that defendants were not personally liable. *Whitford v. Laidler.*

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2. *It seems* that although because of the absence of the corporate seal the corporation might not have been liable in a technical action of covenant, it was liable in an action of *assumpsit* for use and occupation. *Id.*

See LANDLORD AND TENANT.

LIBEL.

1. On trial of an action for libel, where the alleged libelous publication contained charges injurious to plaintiff's character and to his business, and the complaint averred that, by reason of the libel, plaintiff had been greatly injured in his business, by the loss of good-will and patronage, plaintiff was permitted to testify as a witness that immediately after the publication his business fell off, and to state the amount of his daily sales up to and immediately after such publication. *Held* no error. *Bergmann v. Jones.* 51
2. These questions were objected to generally. *Held* defendant could not object on appeal that the complaint was not specific enough to authorize proof of special damage. *Id.*
3. Also *held*, that the evidence was sufficient to justify the submission of the question of special damage to the jury. *Id.*
4. Also *held*, the fact that other persons had published the same libel, and that similar reports had been in circulation, in regard to plaintiff, did not affect his right to have the question so submitted. *Id.*
5. Also *held*, that it was not error to allow plaintiff to testify to the efforts made by him to regain his business and to the hindrance he met with on account of the libel. *Id.*
6. Where a publication is libelous *per se*, and is proved to be false, this is evidence sufficient to require the submission of the question of malice to the jury, and to warrant the allowance of ex-

emplary damage; and this, although defendant give evidence tending to prove no actual malice. Such evidence is to be considered by the jury, and it is for them to determine, in view of all the evidence, whether punitive damages should be allowed or not. *Id.*

7. It is not a ground for a motion to dismiss the complaint in an action for libel that the innuendoes therein are ambiguous or uncertain; any question as to their meaning may be submitted, upon proper requests, to the consideration of the jury. *Id.*

8. Where the libelous article will bear the construction put upon it in the innuendo no other proof is necessary to show that defendant intended to make the charge against plaintiff imputed to him. *Id.*

9. A publication, containing statements holding a person up to scorn or ridicule and which degrade or disgrace him in the eyes of men, is libelous *per se*. *Id.*

LICENSE.

In 1833, J. & H., who owned adjoining farms, agreed orally to lay down logs or pipes upon the lands of J. to carry water from a spring thereon to his buildings, for his use, and from thence to the buildings of H., for his use, each to bear one-half of the expense and perform half of the labor, and in consideration of such expenditure J. agreed that H. should have the right to take the surplus water from the spring through the pipes. There was no specific agreement, however, as to the size of the pipes, how long they were to be continued, who should direct or control them, or the amount of water to be taken, nor was there any arrangement authorizing H. to enter upon the lands of J. for the purpose of repairing, etc. The agreement was carried out, and H. and his successor in title enjoyed the use of the water for over forty years. In an action to restrain de-

fendant, who succeeded to the title of J., from obstructing such use of the water, *held*, that these facts failed to establish a valid agreement in perpetuity; that at most the agreement was a mere license, which, although a consideration was paid, was revocable at the pleasure of the licensor or his successors in interest; that plaintiff could not claim by adverse possession, as the use was by consent, and not adverse. *Cronkhite v. Cronkhite.* 323

LIEN.

An ordinance of the city of New York requires the insertion in every contract for work done for the city, of a clause that payment of the last installment due thereunder shall be retained until satisfactory evidence is furnished "that all persons who have done work or furnished materials under such contract," and who have given ten days written notice that a balance is due them, have been fully paid or secured. In an action by a contractor to recover the last installment due on the contract, *held*, that conceding a material-man could by filing the prescribed notice obtain a lien upon the fund in the hands of the city, as to which *quære*, he could not obtain a lien upon the balance due under one contract for materials furnished upon another. *Quinlan v. Russell.* 350

— When agreement by bank with its correspondents to secure drafts is effectual to give lien on deposits. *See Coats v. Donnell.* 168

— When subsequent lienor may interpose the defense of usury. *See U. D. S. Inst. v. Wilnot.* 221

See MECHANIC'S LIEN.

LIMITATION OF ACTIONS.

1. The provision of the Code of Civil Procedure. (Subd. 3, § 414), exempting from the operation of the chapter (4), limiting the time

for the commencement of actions, a case where a person was entitled to commence an action when the Code took effect, and declaring that in such a case "the provisions of law applicable thereto immediately before this act takes effect continue to be so applicable, notwithstanding the repeal thereof," does not refer simply to statutory provisions, but within the meaning of said exception a rule or doctrine established by judicial decision is a "provision of law" equally with one enacted by the legislature. *Clark v. L. S. & M. S. R. Co.* 217

2. Accordingly *held*, where plaintiff was entitled to, and had commenced his action before the Code went into effect, that the provision of said Code (§ 890), making the statute of limitations of the place of residence of a non-resident defendant available as a defense in certain cases, did not apply; but that the case was governed by the rule in force when the Code went into effect, i. e., that the statute of limitations of a foreign State constituted no defense to an action brought here. *Id.*

3. Where an action was brought against the maker, upon a promissory note, more than twenty years after the same fell due, *held*, that although the statute of limitation was not a bar because of non-residence of defendant, yet that the lapse of time raised a presumption of payment. *Bean v. Tonnoles.* 881

LOTTERIES.

1. The word "lottery" indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. *People v. Nodke.* 187

2. It is not essential, therefore, in an indictment, under the provisions of the statute (1 R. S. 666, § 29) prohibiting the sale of lottery tickets, to set forth the purpose for which the lottery was set on foot, i. e., that it was for the purpose of setting up for sale, or disposing of any species of property. *Id.*

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3. *It seems* that one who purchases a lottery ticket for the purpose of detecting and punishing the vendor, not with intent to aid in the commission of the offense, is not an accomplice within the meaning of the provision of the Code of Criminal Procedure (§ 899), declaring that a conviction cannot be had upon the uncorroborated testimony of an accomplice. *Id.*

4. Neither the provisions of the Federal Constitution, giving to Congress power to regulate commerce among the States, nor that which forbids the passage of any law impairing the obligation of contracts, prevents a State from passing laws prohibiting the making of contracts within its jurisdiction, which are deemed immoral or against the public policy of the State. *Id.*

5. The State, therefore, may prohibit the sale, within its jurisdiction, of tickets in a lottery organized in another State, and which is lawful under the laws of that State; and a sale of such tickets is a violation of said statutory provision. *Id.*

6. Upon trial of an indictment, charging a violation of said provision, defendant was called as a witness in his own behalf; on cross-examination he was asked whether he had been engaged in the business of lottery tickets, and lottery policies; also whether he had been tried and convicted of violating the law prohibiting the sending of lottery circulars through the mail. These questions were objected to and objections overruled. *Held* no error. *Id.*

MANDAMUS.

1. A judgment creditor of a town which has been divided under the act of 1873 (Chap. 319, Laws of 1873) is not entitled to a *mandamus* requiring the board of supervisors of the county to levy and assess the amount due upon the territory formerly included in the town. *People, ex rel. v. Supervisors Ulster Co.* 263

2. *It seems* that the remedy of the creditor is by *mandamus* against the officers of the towns which have any portion of the territory of the old town, requiring them to meet and discharge the duties devolved upon them by the provisions of the Revised Statutes (1 R. S. 338, §§ 4 *et seq.*), which provisions are at least, in the first instance, exclusive and must be pursued. *Id.*

3. *Held*, that a receiver of a life insurance company, appointed under the act of 1869 (Chap. 902, Laws of 1869), and who entered upon the performance of his duties prior to 1883, was entitled to have his compensation fixed by the superintendent of the insurance department, as provided by said act (§ 13); and that he was entitled to a *mandamus* to compel the superintendent to so fix his commissions. *People, ex rel. Newcomb, v. McCall.* 587

MANUFACTURING CORPORATIONS.

Where a stockholder of a manufacturing corporation, whose stock has not been fully paid in, in good faith makes an absolute and valid transfer of his stock to another, he is not liable for calls made after the transfer. *Billings v. Robinson.* 415

MASTER AND SERVANT.

— *Liability of railroad corporation to an employee for negligence.*

See Vosburgh v. L. S. & M. S. R. Co. 374

Disher v. N. Y. C. & H. R. R. Co. (Mem.) 623

MECHANIC'S LIEN.

1. Under the Mechanics' Lien Law for the city of New York (Chap. 379, Laws of 1875) a sub-contractor or material-man can acquire a lien only to the extent of the sum due from the owner to the contractor

at the time of filing the lien. *Gibson v. Lenane.* 183

2. If the owner has prior to that time at the request of the contractor assumed an obligation to pay another sub-contractor or material-man, to the extent of such obligation, it constitutes a payment. *Id.*

3. Where, therefore, the owner has prior to the filing of a lien accepted orders drawn upon him by the contractor, in favor of other sub-contractors or material-men, and the contractor has thereupon receipted as for so much payment, to the full amount of his remaining liability upon the contract, no lien is acquired. *Id.*

4. *It seems* that such an order and its acceptance operates as an equitable assignment of so much of the liability as is required to satisfy the order and the owner's liability to the contractor ceases to that extent. *Id.*

5. An extension of time for payment agreed upon between the owner and the payee does not affect the character of the order or its effect as payment. *Id.*

6. So also if the liability of the owner is assumed at his request and for his benefit by a third person, and this is accepted as payment by the contractor, so far as subsequent liens are concerned, it is payment. *Id.*

7. To give a lien upon a building under the mechanic's lien law for the city of New York, of 1875 (§ 1, chap. 379, Laws of 1875), the work must have been done or materials furnished at the instance of the owner of the building or improvement, or of his agent. *Cornell v. Barney.* 394

8. To give a lien upon the land on which the building stands the building must have been constructed for and at the expense of the owner, or under contract with him. (§ 3.) *Id.*

9. Materials were furnished by

plaintiffs, under a contract with a lessee, for a building in process of construction by the latter, in pursuance of provisions in his lease, by which he covenanted to erect a building on the demised premises of at least a specified value. The lessor covenanted to loan a specified sum as the building advanced, to be secured by mortgage on the lessee's interest. The building, at the end of the last of certain renewals provided for, or sooner in case the lessee failed to perform his covenants, was to revert to and become the property of the lessor. In an action to foreclose an alleged mechanic's lien, *held*, in the absence of evidence that the lessor had some connection with plaintiff's contract, plaintiff was not entitled to have or enforce a lien against the interest of the lessor in the land or building, but only against that of the lessee. *Id.*

MISTAKE.

1. Where a person with full knowledge of all the facts, but through a mistaken belief that his interest in real estate was not subject to sale on execution, has lost his title through a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale after the time for redemption has expired, the court has no power to permit a redemption. *Weed v. Weed.* 243
2. A mistake as to legal rights is not a ground for equitable relief. *Id.*

MORTGAGE.

1. Where a conveyance of real estate, purporting to be an indenture and containing a clause by which the grantee assumes and agrees to pay a mortgage upon the lands conveyed, has been accepted by the grantee, it will, for the purpose of a remedy against the grantee, be considered as the deed of both parties, and the clause as a covenant. *Bowen v. Beck.* 86
2. *It seems*, the grantee, in a convey-

ance by deed-poll containing a mortgage assumption clause, upon acceptance of the deed, becomes bound as covenantor to pay the mortgage. *Id.*

3. As against a purchaser in good faith and for value of a mortgage upon land, executed by one in possession of and holding the legal title to the land, the grantor of the mortgagor is estopped from claiming that the conveyance was induced by fraud on the part of the latter. *Simpson v. Del Hoyo.* 189
4. Although the mortgage may have been assigned successively to several participants in the fraud or *mala fide* purchasers, having reached the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded grantor are cut off. *Id.*
5. The rule that the purchaser of a non-negotiable chose in action takes it subject to all the equities existing between the original parties, and to all the latent equities of third persons does not apply. *Id.*
6. In such a case, however, the fraud being established, the burden is upon the holder of the mortgage, of proving both that he purchased for value and in good faith. *Id.*
7. Where, after having received a conveyance to himself of real estate, part of the trust estate, the trustee executed a mortgage thereon to one having full notice of the rights of the *cestui que trust*, *held*, that the mortgagees might be joined with the trustee as party defendant in an action by the *cestui que trust* to compel a reconveyance for the purpose of affording complete relief, and freeing the title from embarrassment by setting aside the mortgage. *Dodge v. Stevens.* 209
8. Where premises have been conveyed absolutely to secure a loan, and because of a refusal on the part of the lender to reconvey on tender of the amount due, the borrower brings an action to compel a reconveyance, he cannot, after

judgment in his favor in such an action, maintain another action to recover, as damages, the amount of a depreciation in the value of the property pending the litigation, or his costs and expenses in the equity suit; conceding an action to recover damages may be maintained, as to which *quære*, these are not proper items of damages. *Marvin v. Prentice.* 295

9. *It seems* that where a conveyance of land is made subject to the payment of a mortgage thereon, but without an express covenant on the part of the grantee to pay, the disability thus imposed upon him, which prevents him from disputing the validity of the mortgage, may be removed by the grantor by conferring upon the former the right to question the mortgage which the original conveyance withheld. *Bennett v. Bates.* 354

10. The mere deduction of the amount of a mortgage from the purchase-price on sale of the lands does not, in the absence of an agreement to pay, absolutely impose upon the grantee the duty of paying or suffering his land to be taken in payment of the mortgage. While it is evidence of the grantor's intention to subject the land to such payment it is not controlling or conclusive; it may be inferred that the deduction was made to protect the grantee against a questionable incumbrance. *Id.*

11. A mortgage was executed May 10, 1876; the principal was made payable May 10, 1881. In an action to foreclose the mortgage *Held*, that plaintiff was entitled to interest at the rate of seven per cent up to the latter date, and at six per cent thereafter. *Id.*

12. In an action upon a guaranty of payment in an assignment of a bond and mortgage for \$1,250 it appeared that at the time of the assignment there was another mortgage upon the premises, bearing the same date and recorded at the same time as the assigned mortgage. The holder of the other mortgage obtained a decree

of foreclosure thereon, which plaintiff purchased for the sum of \$669.65; the mortgaged premises were sold under the decree to plaintiff for \$100. The defendants were not parties to the foreclosure and it did not appear that they had any knowledge of the foreclosure or the sale. The value of the premises at the date of the assignment was \$3,000, and at the time of sale \$1,500. *Held*, that as the acts of plaintiff were injurious to the rights of the guarantors, they were thereby discharged, either wholly or to the extent to which the security was impaired, *i. e.*, the proportionate part of the value of the mortgaged premises at the time of sale, applicable upon the guaranteed mortgage. *Humphrey v. Hayes.* 594

13. Although where an obligor and mortgagor sells and conveys the mortgaged premises subject to the mortgage, but with no covenant on the part of the grantee to pay, no technical relation of principal and surety arises between them, yet as the land is the primary fund for the payment of the debt, in respect thereof and to the extent of its value the grantee stands in the relation of a principal debtor, and the grantor has an equity similar to that of a surety. *Murray v. Marshall.* 611

14. Where, therefore, in such case the holder of the bond and mortgage by a valid agreement with the grantee, and without the assent or knowledge of the grantor, extends the time of payment of the mortgage, to the extent of the value of the land at the time of the agreement, the latter is discharged from liability upon his bond; to that extent the creditor practically takes the land as his sole security and assumes the risk of collecting that amount out of it. *Id.*

See FORECLOSURE.

MOTIONS AND ORDERS

1. An order in supplementary pro-

- ceedings; appointing a receiver, made by the court or judge authorized to make it, is to be presumed regular until annulled in a direct proceeding; and if the order recite facts giving jurisdiction, it is *prima facie* evidence of the existence of those facts. *Wright v. Nostrand.* 81
2. The court has no power, on motion of a party defendant, to strike out all the allegations of the complaint referring to himself, simply because they are irrelevant to an alleged cause of action against some other defendant; neither the question as to whether the moving party was properly made a defendant, nor the question as to whether the facts alleged make out a good cause of action as to him, can be raised on such a motion. *Hagerty v. Andrews.* 195
3. The power to strike out, on motion, averments in a pleading because of irrelevancy, applies simply to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleadings against the moving party. *Id.*
4. An order allowing the receiver of a firm to come in and defend an action for goods sold, against the members of the firm, was granted upon his petition, in which he averred collusion between plaintiffs and one or more of the defendants, but only on information and belief, without stating any facts or sources of information upon which the belief was based. This averment was positively denied by plaintiffs. *Held*, that the petition was insufficient to support the order and the same was improperly granted. *Honeygger v. Weltstein.* 252
5. An order of General Term, vacating the report of commissioners appointed in proceedings by a railroad corporation to acquire title to lands and the confirmation thereof, and directing a new appraisal before new commissioners, is not reviewable here. *In re N. Y. W. S. & B. R. Co.* 287
6. The General Term, however, has no power on appeal by the company from the order of confirmation to award costs against the owners. *Id.*
7. Where costs are awarded, so much of the General Term order is reviewable here; but this does not confer jurisdiction to review the whole order. *Id.*
8. Plaintiff, the appellant herein, in his proposed case set forth portions of certain tariffs and schedules, prepared and issued by defendant, which were exhibits on the trial; the portions omitted were not referred to on the trial, and in the opinion of the trial judge were not material. Defendant proposed as an amendment that the whole of the exhibits should be inserted. Said judge in settling the case disallowed the amendment, but required plaintiff to paste the exhibits in the appeal-book, if copies were furnished by defendant, or in lieu thereof that the original exhibits might be referred to on the argument. Defendant furnished the copies. On motion by defendant that plaintiff be required to print the exhibits as part of the return to this court plaintiff offered to attach copies to the appeal-book, if furnished by defendant. *Held*, that he should not be required to do more; that the order of the trial judge held good until the final determination of the action. *Külmer v. N. Y. C. & H. R. R. Co.* 495
9. Under the provisions of the Code of Civil Procedure (§ 756 *et seq.*), where, after issue has been joined in an equity action, the plaintiff transfers his interest, the transferee may move to be substituted as plaintiff; and where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing supplemental pleadings, or an amendment of the complaint, aside from such substitution the question as to title in the substituted plaintiff is determined by the order, and

may not be raised upon the trial; and this, although defendant made default upon the motion. *Smith v. Zalinski*. 519

10. *It seems* that upon the hearing of such a motion the applicant must establish his ownership; if it is disputed by defendant, the court may decide it, or if there be doubt, may deny the motion, and order the action to proceed without regard to the transfer. The court may also, in its discretion, order an amendment of the pleadings, or such supplemental pleadings as will present the question on trial.

Id.

11. *It seems* that if the action be one at law, and defendant contests the change of ownership, and demands that the issue be tried by jury, the court should order such supplemental pleadings.

Id.

12. As to whether, where the court decides the question in favor of substitution, and without permitting allegations to be framed which will let in the new issue at the trial, its order is reviewable here, *quære*.

Id.

13. A motion for arrest of judgment in a criminal action could not, before the adoption of the Code of Criminal Procedure, and cannot now, be made, save for some defect that appears upon the record; it may not be based upon proof by affidavit of facts outside, and constituting no part of the record. (Code of Criminal Procedure, § 467.) *People v. Kelly*. 526

14. Proof by affidavit that the jury on trial of such an action, after retiring to their room, sent a written communication to the presiding judge, and that he answered the same in writing, in the absence of proof as to the nature of the communication, is not sufficient to sustain a motion for a new trial. *Id.*

15. After the granting of a General Term order herein, which in effect gave the defendant liberty to inspect plaintiffs' books and papers, plaintiffs moved, at a Special Term,

on additional facts, for an order vacating or limiting the General Term order; the motion was denied on the ground that plaintiffs' remedy was by application to the General Term, but a stay of proceedings was granted for the purposes of such an application, unless defendant would stipulate to take an inspection under the supervision of a referee. Defendant refused to stipulate, and appealed. The General Term affirmed the order, and, upon the new facts presented, vacated its former order, and prohibited the making of a new order for an inspection. *Held*, that an inspection having been granted upon terms which the Special Term could lawfully impose, upon defendant's refusal to accept those terms it was in the discretion of the General Term to deny the inspection entirely, and the exercise of this discretion was not reviewable here. *Clyde v. Rogers*. 541

— *When order improperly granted allowing receiver of a firm to come in and defend an action against members of firm, and when reviewable here.*

See Honegger v. Weinstein. 253

MUNICIPAL CORPORATIONS.

1. Where, by the charter of a municipal corporation, it had power to repair streets and sidewalks and "to prevent the incumbering or obstructing the same in any manner," *held*, that it was liable for injuries occasioned by an omission on its part to repair or remove a sidewalk constructed without its authority, which had been, for a sufficient length of time to charge it with notice, in so defective a condition as to be dangerous for travel. *Saulsbury v. Vill. of Ithaca*. 27

2. In an action to recover damages for alleged negligence in leaving unguarded and unlighted an opening temporarily made in a city street, the defendants, who, the complaint alleged, were officers of the city, *i. e.*, the mayor, common council and street commissioner, and by its charter charged with

the duty of keeping its streets in repair were sued in their individual names, with the title of their respective offices added; the word "as" did not precede their official designations. The complaint also averred that the mayor and common council directed the excavation to be made, and "the said street commissioner" left it unguarded; it closed with a demand of judgment "against the defendants." *Held*, that the action was against the defendants as individuals, not as officers of the city; that the addition of their official titles was simply *descriptio personarum*. *Bennett v. Whitney*. 302

3. Also *held*, that a provision in the city charter (§ 6, title 14, chap. 291, Laws of 1867), declaring its officers liable for all damages "sustained by reason of willful neglect" did not take away or affect the common-law liability of an officer for simple negligence. *Id.*

NAVY.

Persons belonging to the army and navy, who have no permanent residence they can call home, are to be regarded as travelers when stopping at public inns; to deprive them of their privileges as such, and to give them the character of boarders merely, it must appear that an explicit contract was made to that effect. *Hancock v. Rand*. 1

NEGLIGENCE.

1. To bring a case within the provision of the General Railroad Act (§ 7, chap. 282, Laws of 1854), requiring that a bell shall be rung or whistle sounded upon the engine of a train approaching "the place where the railroad shall cross any traveled public road or street," it is not sufficient that the *locus in quo* has been so dedicated to the public, by the owners, as to constitute it a public street; to bring it within the requirement, the street must be traveled as well as

public. *Byrne v. N. Y. C. & H. R. R. Co.* 13

2. Where, therefore, plaintiff was injured at a point where defendant's road crossed an alley, which was not traveled or capable of being traveled save at one end, and such travel did not cross the railroad, *held*, that the omission of the statutory signals was not negligence. *Id.*
3. Where, by the charter of a municipal corporation, it had power to repair streets and sidewalks and "to prevent the incumbering or obstructing the same in any manner," *held*, that it was liable for injuries occasioned by an omission on its part to repair or remove a sidewalk constructed without its authority, which had been, for a sufficient length of time to charge it with notice, in so defective a condition as to be dangerous for travel. *Saulsbury v. Vil. of Ithaca*. 27
4. In an action to recover for loss of baggage these facts appeared: Plaintiff held passage tickets for himself and family over defendant's road from New York to Niagara Falls, and also tickets from the latter place to New Orleans by the "Mobile route," in which route it did not appear that defendant had any interest, but it, in connection with defendant's road, formed a continuous line between New York and New Orleans. Plaintiff presented these tickets with his baggage to the baggage-master at defendant's baggage-room in New York city and requested him to check the baggage from New York to New Orleans by the route indicated. The baggage-master examined the tickets, assented to the request and gave plaintiff checks for his trunks, which he put in his pocket without examining. Upon the checks were the words "New Orleans and New York," and also certain letters and abbreviations which, as explained by experts, indicate the several roads forming the "Great Jackson route." Defendant delivered the baggage to

- the agent of the Great Jackson route at Niagara Falls, and while in transit it was destroyed by an accident. *Held*, that the undertaking of the baggage-master to check by the Mobile route was the undertaking of defendant, and included an agreement to deliver at the end of its road to the next succeeding carrier; that by the delivery to another carrier, in the absence of contributory negligence on the part of plaintiff, it remained liable as insurer; also that the omission of plaintiff to examine the checks was not such contributory negligence as prevented a recovery; that at least it was a question for the jury as to whether he had a right to repose upon the representation of the baggage-master without examining the checks, also as to whether an inspection of the checks would have apprised a person, not an expert or familiar with the roads making up the routes between New York and New Orleans, that a mistake had been made. *Isaacson v. N. Y. C. & H. R. R. Co.* 278
5. One who assumes the duties, and is invested with the powers of a public officer, is liable to an individual who sustains special damage because of a neglect properly to perform those duties. *Bennett v. Whitney.* 302
6. While in some cases, in order to charge an officer, upon whom is imposed the duty of keeping a street in repair, with damages resulting from a defect in the street, it is necessary to show that he had adequate means in his hands to make the repairs; such proof is not necessary in a case of *misfeasance*, i. e., when the officer has acted, but negligently, to the special injury of plaintiff. *Id.*
7. In an action against municipal officers to recover damages for alleged negligence in leaving unguarded and unlighted an opening temporarily made in a street, *held*, that a provision in the city charter (§ 6, title 14, chap. 291, Laws of 1867), declaring its officers liable for all damages "sustained by reason of willful neglect" did not take away or affect the common-law liability of an officer for simple negligence. *Id.*
8. Where a railroad corporation purchased the line of another company, of which an existing bridge formed a part, which bridge at the time of the purchase was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector, and could have been easily and surely ascertained by proper examination, *held*, that it was negligence on the part of the corporation to continue its use without such an inspection and a correction of the defects; that it was liable to an employee upon one of its trains for injuries received by a fall of the bridge; and this, although the bridge had been in use for several years before the purchase. *Vosburgh v. L. S. & M. S. R. Co.* 374
9. *It seems* that the prior use might have justified a continuance of the use until a competent inspection could reasonably have been made, but did not justify a neglect, when an inspection was made, to observe and remedy the defects. *Id.*
10. *It seems* that one whose negligence has occasioned a personal injury to another is liable for the proximate consequences of his act, although these are aggravated by reason of the delicate health of the person injured, the liability is not limited to such consequences of the injury as would have resulted if the person had been in good bodily health. *Tice v. Munn.* 621
- *Liability of railroad corporation to employes for negligence.*
See Vosburgh v. L. S. & M. C. R. Co. 374
Disher v. N. Y. C. & H. R. R. Co. (Mem.) 622
- NEW LOTS (TOWN OF).
- *As to right to remove police commissioners in.*
See Bergen v. Powell. 591

NEW TRIAL.

Proof by affidavit that the jury on trial of a criminal action, after retiring to their room, sent a written communication to the presiding judge, and that he answered the same in writing, in the absence of proof as to the nature of the communication, is not sufficient to sustain a motion for a new trial. *People v. Kelly.* 526

NEW YORK (CITY OF).

1. Where under the provision of the act of 1871 in reference to "the police life insurance fund" (Chap. 126, Laws of 1871) the commissioners of police of the city of New York have, as the board of trustees of that fund, granted a pension to a retired officer of the police force, the beneficiary does not thereby acquire a vested right to the pension, but the board has by the act (§ 5) authority in its discretion to discontinue the same. *People, ex rel. v. Matsell.* 179

2. An ordinance of the city of New York requires the insertion in every contract for work done for the city, of a clause that payment of the last installment due thereunder shall be retained until satisfactory evidence is furnished "that all persons who have done work or furnished materials under such contract," and who have given ten days written notice that a balance is due them, have been fully paid or secured. In an action by a contractor to recover the last installment due on a contract, *held*, that conceding a material-man could by filing the prescribed notice obtain a lien upon the fund in the hands of the city, as to which *quære*, he could not obtain a lien upon the balance due under one contract for materials furnished upon another. *Quinlan v. Russell.* 350

3. Under the limitation in the provision of the charter of the city of New York (§ 23, chap. 335, Laws of 1873), authorizing the heads of departments to remove subordi-

nates in their departments, which prohibits the removal of a regular clerk or head of a bureau "until he has been informed of the cause of the proposed removal and has been allowed an opportunity for explanation," the power of removal may not be exercised unless some cause exists, such as neglect of duty, incapacity, or unfitness for the position. *People, ex rel. Keech, v. Thompson.* 451

4. Where, however, a statement of charges with a specification of facts furnishing a sufficient cause for removal, and sufficiently distinct to apprise the subordinate of the grounds upon which the charges are based, with notice of a time and place when an opportunity for an explanation will be given, is served upon him; and where, at the time and place specified, an opportunity for explanation is given the requirements of the statute are met, it is not requisite that the charges and specifications should be drawn with the formal exactness of pleadings in a court of justice; nor is the subordinate entitled to a regular trial. The head of the department, if the explanations are not satisfactory to him, may, in his discretion, remove, without calling witnesses to substantiate the charges, or allowing testimony on the part of the subordinate; he may exercise the power upon facts within his own knowledge or based upon information received from others. *Id.*

5. The distinction between said provision and that giving to the mayor the power to remove heads of departments (§ 25) pointed out. *Id.*

6. The relator, who was superintendent of repairs and supplies in the department of public works, was served with a communication charging him, among other things, with neglect and inaction in the matter of fitting up two armories. By way of answer, the relator denied that such work came under his supervision and alleged that he was not responsible for the neglect. *Held* that, conceding

relator was entitled to a trial when the charges were denied, this answer was in the nature of a demurrer, and so admitted the facts charged; and, as the armories were clearly under his charge (§ 72, sub. 7), and he responsible for the neglect, there was sufficient ground for removal, and so no necessity for a trial on the other charges. *Id.*

7. The question as to the reasonableness of the time allowed for explanation rests to a great extent in the discretion of the head of the department; and where it does not appear that the discretion has been abused, a refusal to give further time furnishes no ground for a reversal of his decision. *Id.*

8. The words "tenement-houses" in the title of the act entitled "An act to improve the public health in the city of New York by prohibiting the manufacture of cigars and preparation of tobacco in any form in the tenement-houses of said city" (Chap. 93, Laws of 1883), refer to a distinct class of houses recognized and defined by law, and the subject of the act as expressed in the title is limited to that class of buildings. *In re Paul.* 497

9. The subject of the section of said act (§ 1) prohibiting the manufacture of cigars or preparation of tobacco "in any rooms or apartments which in the city of New York are used as dwellings, for the purpose of living, sleeping or doing any household work therein," is not embraced in the title; its inclusion, therefore, in the act is violative of the provision of the State Constitution (Art. 3, § 16) declaring that no private or local bill "shall embrace more than one subject, and that shall be expressed in the title," and said section is void. *Id.*

10. The court has no power to change and narrow the terms of an act for the purpose of bringing its subject within the title, and so saving it from the constitutional objection. *Id.*

11. *It seems that, striking out said section, the act does not prohibit the manufacture of cigars or preparation of tobacco in tenement-houses; the only other prohibition is (§ 2) against the use "for dwelling purposes" of "any part of any floor of any tenement-house" where such manufacture or preparation is carried on.* *Id.*

— *Mechanic's Lien law for, construed.*

See Gibson v. Lenane. 183
Cornell v. Barney. 394

NEXT OF KIN.

While a person may not, as next of kin simply, sue to recover personal property of a deceased person, a recovery by next of kin may be permitted without the intervention of an administrator, under special circumstances, as where his right to the property is clear and has been admitted by defendant. *Segelken v. Meyer.* 473

NOTICE.

— *When party not chargeable with notice of a private statute.*
See Groat v. Moak. 115

NUISANCE.

— *When a dam across a stream which is a public highway may not be considered a nuisance.*
See Groat v. Moak. 115

OFFICE AND OFFICER.

1. One who assumes the duties, and is invested with the powers of a public officer, is liable to an individual who sustains special damage because of an neglect properly to perform those duties. *Bennett v. Whitney.* 302
2. While in some cases, in order to charge an officer, upon whom is imposed the duty of keeping a street in repair, with damages resulting from a defect in the street,

it is necessary to show that he had adequate means in his hands to make the repairs; such proof is not necessary in a case of *misfeasance*, i. e., when the officer has acted, but negligently, to the special injury of plaintiff. *Id.*

3. Under the limitation in the provision of the charter of the city of New York (§ 28, chap. 835, Laws of 1873), authorizing the heads of departments to remove subordinates in their departments, which prohibits the removal of a regular clerk or head of a bureau "until he has been informed of the cause of the proposed removal and has been allowed an opportunity for explanation," the power of removal may not be exercised unless some cause exists, such as neglect of duty, incapacity, or unfitness for the position. *People, ex rel. Keech, v. Thompson.* 451

4. Where, however, a statement of charges with a specification of facts furnishing a sufficient cause of removal, and sufficiently distinct to apprise the subordinate of the grounds upon which the charges are based, with notice of a time and place when an opportunity for an explanation will be given, is served upon him; and where, at the time and place specified, an opportunity for explanation is given, the requirements of the statute are met, it is not requisite that the charges and specifications should be drawn with the formal exactness of pleadings in a court of justice; nor is the subordinate entitled to a regular trial. The head of the department, if the explanations are not satisfactory to him, may, in his discretion, remove, without calling witnesses to substantiate the charges, or allowing testimony on the part of the subordinate; he may exercise the power upon facts within his own knowledge or based upon information received from others. *Id.*

5. The distinction between said provision and that giving to the mayor the power to remove heads of departments (§ 25) pointed out. *Id.*

6. The provision of the State Constitution (Art. 10, § 8), declaring that where the duration of an office is not provided by the Constitution or declared by law "such office shall be held during the pleasure of the authority making the appointment," applies only when the power is continuous. *Bergen v. Powell.* 591

7. Where appointments had been made under the act of 1878 (Chap. 805, Laws of 1878), making provision for a police commission in the town of New Lots, which provides for the appointment of three commissioners within thirty days after the passage of the act by certain town officers specified, among others "the justices of the peace * * * now in office having the shortest term to serve," and that in case of a vacancy in said office the successor shall be appointed by the supervisor of the town, *held*, that the power of original appointment was conferred only upon those who at the time specified held the offices named, not upon those who might thereafter be incumbents; also that the power embraced but a single act and was exhausted with its performance; and that those holding the offices named had no authority to remove the persons so appointed. *Id.*

ORDERS.

—When order and acceptance amounts to equitable assignment of claim under a building contract and as payment upon the contract. *See Gibson v. Lenane.* 183

PARTIES.

1. Where, after having received a conveyance to himself of real estate part of the trust property, the trustee executed a mortgage thereon to one having full notice of the rights of the *cestui que trust held*, that the mortgagee might be joined with the trustee as party defendant in an action by the *cestui que trust* to compel a reconveyance for the purpose of affording

- complete relief, and freeing the title from embarrassment by setting aside the mortgage. *Dodge v. Stevens*. 209
2. An order allowing the receiver of a firm to come in and defend an action against the members of the firm was granted upon his petition, in which he averred collusion between plaintiffs and one or more of the defendants, but only on information and belief, without stating any facts, or sources of information upon which the belief was based. This averment was positively denied by plaintiffs. *Held*, that the petition was insufficient to support the order and the same was improperly granted. *Honegger v. Wettstein*. 252
3. Also *held*, that the receiver had no such interest in the action as authorized him to intervene. *Id.*
4. An action to recover money or personal property belonging to an infant may be brought in the name of the infant by his guardian *ad litem*, although he has a general guardian. While the statute gives to the latter the custody and management of the infant's personal estate (2 R. S. 150, § 3), the beneficial interest is in the infant and he may maintain the action. (Code of Civil Procedure, § 468.) *Segelken v. Meyer*. 473
5. While a person may not, as next of kin simply, sue to recover personal property of a deceased person, a recovery by next of kin may be permitted without the intervention of an administrator, under special circumstances, as where his right to the property is clear and has been admitted by defendant. *Id.*
6. The act of 1869 (Chap. 678, Laws of 1869), declaring that on a criminal trial the accused "shall, at his own request, but not otherwise, be deemed a competent witness," is not violative of the provision of the State Constitution (Art. 1, § 6), declaring that no person shall "be compelled in any criminal case to be a witness

against himself." The supposed moral coercion by reason of the adverse inference which might be drawn from the omission of the accused to testify is not compulsion within the meaning of the Constitution. *People v. Courtney*. 490

7. Under the provisions of the Code of Civil Procedure (§ 756 *et seq.*), where, after issue has been joined in an equity action, the plaintiff transfers his interest, the transferee may move to be substituted as plaintiff; and where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing supplemental pleadings, or an amendment of the complaint, aside from such substitution, the question as to title in the substituted plaintiff is determined by the order, and may not be raised upon the trial; and this, although defendant made default upon the motion. *Smith v. Zalinski*. 519

PAYMENT.

1. Where a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer. *Knapp v. Roche*. 329
2. In an action brought by a receiver of an insolvent savings bank against an officer thereof to recover damages for losses alleged to have been occasioned by illegal loans made by him, it appeared that two other officers co-operated in making the loans; the complaint averred and it also appeared by plaintiffs' evidence that portions of such loans remained unpaid. Defendant then offered to prove payment by one of the other officers of a specified sum on account of such claim; this was objected to and excluded. *Held*, error; that to maintain the action it was not sufficient to allege and show illegal loans merely, but also damages resulting therefrom, as that the loans had not been paid;

and therefore it was competent in reduction of damages to show that a portion of the moneys illegally taken from the bank had been refunded by one jointly liable with defendant therefor; also that the evidence was proper under a general denial in the answer. *Id.*

3. Defendant S. purchased for \$15,000 certain premises, upon which she held mortgages amounting to \$11,400. She agreed to give her bond with a mortgage on the premises to secure the purchase-price, from which was to be deducted the amount of her mortgages; these were satisfied and surrendered on receipt of the deed, but a mortgage was presented to her for execution, prepared by the grantee's attorney, for the full amount of the purchase-price, which she executed and delivered in ignorance of the fact that the deduction agreed upon had not been made. There was no special agreement that her mortgage should be given simply for the balance, but she supposed that the amount due her had been or would be deducted. This mortgage was assigned on the day of its execution by the mortgagee to H., his attorney, and by the latter with a guaranty of payment to plaintiff, without any indorsement of payment thereon. In an action to foreclose the said mortgage, *held*, that the satisfaction and delivery by S. of the bonds and mortgages held by her operated as a payment upon the mortgage in suit; that the omission to indorse such payment did not affect her right to claim it; and that she was entitled to the benefit of the payment, even as against a *bona fide* purchaser. *Bennett v. Bates.* 354

4. S. sold and conveyed the premises to defendant B., subject to the payment of the mortgage, "if (as was stated in the deed) there shall be found any thing owing and unpaid upon the same." The evidence showed that the whole amount of the mortgage was deducted from the purchase-price. *Held*, that this fact alone did not charge the land with the payment of the full amount; and as the

deed disclosed a clear intention on the part of the grantor to convey her interest in the land and subject it only to the payment of the sum actually owing on the mortgage, this justified a finding to that effect, and such a finding having been made, that the grantee was entitled to the benefit of the payment. *Id.*

5. B., with knowledge of the facts, paid to plaintiff \$1,050 specifically as one year's interest on the mortgage. *Held*, that while B. was not estopped by such payment from questioning the validity of the mortgage debt, yet, as it was a voluntary payment upon a disputed claim, she was not entitled to have the excess of the sum paid over the interest actually due applied generally as a payment upon the mortgage. *Id.*

6. Where an action was brought against the maker, upon a promissory note, more than twenty years after the same fell due, *held*, that although the statute of limitation was not a bar because of non-residence of defendant, yet that the lapse of time raised a presumption of payment. *Bean v. Tonnel.* 381.

— When order and acceptance amounts to equitable assignment of claim under a building contract and as payment upon the contract. *See Gibson v. Lenane.* 183

See APPLICATION OF PAYMENTS.

PENSION.

Where under the provision of the act of 1871 in reference to "the police life insurance fund" (Chap. 126, Laws of 1871) the commissioners of police of the city of New York have, as the board of trustees of that fund, granted a pension to a retired officer of the police force, the beneficiary does not thereby acquire a vested right to the pension, but the board has by the act (§ 5) authority in its discretion to discontinue the same. *People, ex rel. v. Matsell.* 179

PERJURY.

1. Perjury may be assigned upon false testimony going to the credit of a witness who has given material evidence on a trial. *People v. Courtney.* 490
2. *It seems* that false swearing is perjury whenever the testimony is relevant to the case, although it may not directly bear upon the issue. *Id.*

PERSONAL PROPERTY.

The real owner of personal property is only estopped from asserting his title to it when and so far as he has allowed another to have the appearance of ownership. *Hentz v. Miller.* 64

PLEADING.

1. Where two causes of action upon contract are joined in the same action a demurrer to the complaint upon the ground that all of the defendants are not affected by both causes lies at the instance of a defendant who is so affected. The objection is not to the misjoinder of parties, but of causes of action, and so the rule that a defendant against whom a good cause of action is pleaded may not demur because too many are joined does not apply. *Nichols v. Drew.* 22
2. It is not a ground for a motion to dismiss the complaint in an action for libel that the innuendoes therein are ambiguous or uncertain; any question as to their meaning may be submitted, upon proper requests, to the consideration of the jury. *Bergmann v. Jones.* 51
3. The complaint in an action to foreclose a mortgage alleged that the mortgage, with accompanying bond, was executed and delivered to the mortgagees named, to secure the payment of \$4,000 and that it was duly assigned and transferred to plaintiff; the answer admitted the execution of the securities as alleged, and the due assignment thereof to the plaintiff, but averred that they were made in pursuance of an usurious agreement with the plaintiff. The trial court found the usurious agreement substantially as alleged, and that the bond and mortgage was never delivered to, or in the possession of, the mortgagees. *Held*, that in the absence of any waiver of the admission in the pleadings, this last finding was error. (Code of Civil Procedure, § 522.) *Dunham v. Cudlipp.* 129
4. The court has no power, on motion of a party defendant, to strike out all the allegations of the complaint referring to himself, simply because they are irrelevant to an alleged cause of action against some other defendant; neither the question as to whether the moving party was properly made a defendant, nor the question as to whether the facts alleged make out a good cause of action as to him, can be raised on such a motion. *Hagerty v. Andrews.* 195
5. The power to strike out, on motion, averments in a pleading because of irrelevancy, applies simply to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleadings against the moving party. *Id.*
6. In an action to recover damages for alleged negligence in leaving unguarded and unlighted an opening temporarily made in a city street, the defendants, who, the complaint alleged, were officers of the city, i. e., the mayor, common council and street commissioner, and by its charter charged with the duty of keeping its streets in repair, were sued in their individual names, with the title of their respective offices added, the word "as" did not precede their official designations. The complaint also averred that the mayor and common council directed the excavation to be made, and "the said street commissioner" left it unguarded; it closed with a demand of judgment "against the defendants." *Held*, that the action

- was against the defendants as individuals, not as officers of the city; that the addition of their official titles was simply *descriptio personæ*. *Bennett v. Whitney*. 302
7. While the omission of the word "as" is not conclusive when the body of the complaint plainly discloses an official or representative capacity as the ground of the action, where its scope and averments harmonize with the omission, the action will be considered as against the defendants individually. *Id.*
8. Where a complaint alleged that plaintiff intrusted to defendant a sum of money upon his promising to invest the same for the former, but that he converted it to his use and refused to pay the same, *held*, that plaintiff, in the absence of any amendment of the complaint, was not entitled to recover upon proof that defendant did in good faith invest the money, but negligently took insufficient security; that it was necessary to show either that defendant made no investment, or if he did in form, that it was not *bona fide*. *King v. MacKellar*. 817
9. Where a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer. *Knapp v. Rocha*. 829
10. The complaint in an action against sureties upon the bond of H., as general agent of an insurance company, set forth the contract of employment, the giving of the bond by H. conditioned for the faithful performance of his duties, and for an accounting and payment over by him each month of all moneys in his hands, and a failure to account and pay over; also the bringing of an action against H., after notice to the sureties of default and the intention to sue, and a recovery of judgment in said action, the issuing of execution and return thereof unsatisfied. The answer averred that defendants "have no knowledge or information sufficient to form a belief as to whether" the agent was at the time of the commencement of the action indebted to plaintiff "in the sum mentioned in the complaint, or in any other sum, and therefore deny the same." *Held*, that the denial was merely of a legal conclusion and put in issue none of the facts alleged in the complaint. *Emery v. Baltz*. 408
11. An agent or person acting in a fiduciary capacity is not subject to an action for tort for mere acts of omission, as for not paying over money due, but only for acts of misfeasance, and in an action against him for not accounting or not paying over a balance found due on an accounting, the plaintiff does not, by adding to the allegation of refusal to pay an assertion that defendant has converted the money to his own use, convert the action into one for tort; the addition is mere surrolusage. *Segelken v. Meyer*. 478
12. The complaint herein alleged the employment of defendant as attorney, etc., and that while so employed he received the money in question "in a fiduciary capacity," that the same had been demanded, but that he neglected and refused to pay the same and had converted it to his own use. *Held*, that the cause of action was one *ex contractu* not *ex delicto*. *Id.*
13. In the cases where under the Code of Civil Procedure (§ 550) the right to arrest depends upon facts extrinsic the cause of action, and where no execution against the person can issue unless an order of arrest has been obtained and executed before judgment, these extrinsic matters need not be alleged in the complaint, and if alleged, are immaterial to the cause of action and need not be proved upon the trial. *Id.*
14. The complaint, in an action under the Code of Civil Procedure (§ 1861) to establish a will, alleged in substance, that the testator, an inhabitant of, and domiciled in the county of R., in this State, and

possessed of personal property therein, but temporarily residing in Spain, duly signed, published, declared and executed the instrument in question before a notary, that it remains on file in the office of the notary, from which, by reason of the laws of Spain, it cannot be taken, and that plaintiff is a legatee under the will. *Held*, that a case was made out authorizing the action. *Younger v. Duffie*. 535

— *Where objection to contract of sale that it is void under statute of frauds is not taken in pleadings, or on trial, it cannot be raised by requests to find.*

See Porter v. Wormser.

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POLICE.

1. Where under the provision of the act of 1871 in reference to "the police life insurance fund" (Chap. 126, Laws of 1871) the commissioners of police of the city of New York have, as the board of trustees of that fund, granted a pension to a retired officer of the police force, the beneficiary does not thereby acquire a vested right to the pension, but the board has by the act (§ 5) authority in its discretion to discontinue the same. *People, ex rel. v. Matsell*. 179
2. Where appointments had been made under the act of 1878 (Chap. 305, Laws of 1878), making provision for a police commission in the town of New Lots, which provides for the appointment of three commissioners within thirty days after the passage of the act by certain town officers specified, among others "the justices of the peace * * * now in office having the shortest term to serve," and that in case of a vacancy in said office the successor shall be appointed by the supervisor of the town, *held*, that the power of original appointment was conferred only upon those who at the time specified held the offices named, not upon those who might thereafter be incumbents; also that the power embraced but a single act and was

exhausted with its performance; and that those holding the offices named had no authority to remove the persons so appointed. *Bergen v. Powell*. 591

POSSESSION.

See ADVERSE POSSESSION.

PRACTICE.

1. *It seems*, that the party aggrieved, by an order of General Term affirming an interlocutory judgment, must wait until final judgment is entered, when he may either appeal directly to this court (Code of Civil Procedure, § 1336), in which case the appeal will bring up for review only the determination of the General Term, affirming the interlocutory judgment, or he may appeal to the General Term (§ 1350), which appeal will bring up for review only the proceedings after the interlocutory judgment, and in case of affirmance he may appeal to this court, which appeal will present for review all the questions of law involved in the whole case. *Raynor v. Raynor*. 248
2. *It seems* also, that where the General Term, on appeal from either the interlocutory or the final judgment, grants a new trial, an appeal may be taken to this court (§§ 190, 191). *Id.*
3. *It seems*, that a party aggrieved by an interlocutory judgment may also, after entry of the judgment, move for a new trial (§ 1001) on one or more exceptions contained in a case settled as prescribed (§ 997), and from the order granting or refusing the motion an appeal may be taken to this court (§ 190). *Id.*
4. An appellant is simply bound to present his case to the General Term upon the case as settled, and to this court upon the same record; he is not bound to print matter proposed by the respondent as an amendment to the case, but dis-

allowed by the trial judge. *Kulmer v. N. Y. C. & H. R. R. Co.* 495

5. Plaintiff, the appellant herein, in his proposed case set forth portions of certain tariffs and schedules, prepared and issued by defendant, which were exhibits on the trial; the portions omitted were not referred to on the trial, and in the opinion of the trial judge were not material. Defendant proposed as an amendment that the whole of the exhibits should be inserted. Said judge in settling the case disallowed the amendment, but required plaintiff to paste the exhibits in the appeal-book, if copies were furnished by defendant, or in lieu thereof that the original exhibits might be referred to on the argument. Defendant furnished the copies. On motion by defendant that plaintiff be required to print the exhibits as part of the return to this court plaintiff offered to attach copies to the appeal-book, if furnished by defendant. *Held*, that he should not be required to do more; that the order of the trial judge held good until the final determination of the action. *Id.*

6. *It seems*, that such a practice is not to be encouraged, but as the permission to bring in the exhibits was in favor of respondent he could not complain. *Id.*

7. Under the provisions of the Code of Civil Procedure (§ 756 *et seq.*), where, after issue has been joined in an equity action, the plaintiff transfers his interest, the transferee may move to be substituted as plaintiff; and where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing supplemental pleadings, or an amendment of the complaint, aside from such substitution, the question as to title in the substituted plaintiff is determined by the order, and may not be raised upon the trial; and this, although defendant made default upon the motion. *Smith v. Zankels.* 519

8. *It seems* that upon the hearing of such a motion the applicant must establish his ownership; if it is disputed by defendant, the court may decide it, or if there be doubt, may deny the motion, and order the action to proceed without regard to the transfer. The court may also, in its discretion, order an amendment of the pleadings, or such supplemental pleadings as will present the question on trial. *Id.*

9. *It seems* that if the action be one at law, and defendant contests the change of ownership, and demands that the issue be tried by jury, the court should order such supplemental pleadings. *Id.*

10. As to whether, where the court decides the question in favor of substitution, and without permitting allegations to be framed which will let in the new issue at the trial, its order is reviewable here, *quare.* *Id.*

11. A motion for arrest of judgment in a criminal action could not, before the adoption of the Code of Criminal Procedure, and cannot now, be made, save for some defect that appears upon the record; it may not be based upon proof by affidavit of facts outside, and constituting no part of the record. (Code of Criminal Procedure, § 467.) *People v. Kelly.* 526

12. Proof by affidavit that the jury on trial of such an action, after retiring to their room, sent a written communication to the presiding judge, and that he answered the same in writing, in the absence of proof as to the nature of the communication, is not sufficient to sustain a motion for a new trial. *Id.*

13. *It seems* that for the purpose of presenting the question the true practice in such case is to make a statement of the facts presented by the affidavit, as part of a proposed case and exceptions, thus giving to the court an opportunity of making and incorporating in the record an explanation disclosing

the character of the communications. *Id.*

14. As the act of 1879 (Chap. 542, Laws of 1879), amending the provisions of the Code of Civil Procedure (§ 549) in reference to arrest, by authorizing an arrest in an action on contract where fraud is alleged in the complaint, and declaring that where such an allegation is made, plaintiff cannot recover without proving fraud, by its terms (§ 2), does not apply to actions theretofore commenced, it is not essential in such an action where the defendant has been arrested on affidavits charging fraud, to amend the complaint by inserting therein allegations of fraud, nor is it necessary to prove the fraud on the trial. *Humphrey v. Hayes.* 504

PRESCRIPTION.

In 1832, J. & H., who owned adjoining farms, agreed orally to lay down logs or pipes upon the lands of J. to carry water from a spring thereon to his buildings, for his use, and from thence to the buildings of H., for his use, each to bear one-half of the expense and perform half of the labor, and in consideration of such expenditure J. agreed that H. should have the right to take the surplus water from the spring through the pipes. There was no specific agreement, however, as to the size of the pipes, how long they were to be continued, who should direct or control them, or the amount of water to be taken, nor was there any arrangement authorizing H. to enter upon the lands of J. for the purpose of repairing, etc. The agreement was carried out, and H. and his successor in title enjoyed the use of the water for over forty years. In an action to restrain defendant, who succeeded to the title of J., from obstructing such use of the water, *held*, that these facts failed to establish a valid agreement in perpetuity; that at most the agreement was a mere license, which, although a consideration was paid, was revocable

at the pleasure of the licensor or his successors in interest; that plaintiff could not claim by adverse possession, as the use was by consent, and not adverse. *Cronkhite v. Cronkhite.* 323

PRESUMPTIONS.

1. Proceedings supplementary to execution and for the appointment of a receiver are not special statutory proceedings, such as require affirmative proof of the facts conferring jurisdiction upon the court or officer acting when questioned collaterally, but simply proceedings in the action, and such acts are entitled to all the presumptions of regularity belonging to proceedings in courts of general jurisdiction. *Wright v. Nostrand.* 31
2. An order, therefore, in such a proceeding, appointing a receiver, made by the court or judge authorized to make it, is to be presumed regular until annulled in a direct proceeding; and if the order recite facts giving jurisdiction, it is *prima facie* evidence of the existence of those facts. *Id.*
3. Supplementary proceedings were instituted in April, 1875; plaintiff was appointed receiver therein in February, 1878. It was not shown that the proceedings were adjourned from time to time. *Held*, that the court would not presume a loss of jurisdiction from the omission to show regular adjournments. *Id.*
4. Where an action was brought against the maker, upon a promissory note more than twenty years after the same fell due, *held*, that although the statute of limitations was not a bar because of non-residence of defendant, yet that the lapse of time raised a presumption of payment. *Bean v. Tonnel.* 381
5. In an action upon a bond the defense was that a mortgage was given as security for its payment; that defendant conveyed the mortgaged premises subject to the pay-

ment of the mortgage, and was discharged by an agreement made, without his assent or knowledge, between the plaintiff and the grantee, whereby in consideration of the payment by the latter of \$500 of the principal and the interest unpaid, the former extended the time of payment of the residue. The trial court found the facts as alleged in the answer, and directed a dismissal of the complaint; there was no finding or request to find as to the value of the land at the time of the extension, and on appeal to this court the evidence was not returned. *Held*, it was a fair inference from the facts found, that the value of the land equaled the amount of the mortgage debt; and that it might properly be assumed in support of the judgment. *Murray v. Marshall*. 611

— When in case of bonds issued by a foreign corporation which are valid on their face it is to be presumed that the provision of law authorizing their issue has been complied with, and the burden is upon one assailing them, to show the contrary.

See Nichols v. Mase.

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PRINCIPAL AND AGENT.

1. Where an agent has been intrusted with his principal's money, to be expended for a specific purpose, the former may be required to account in equity; and upon such an accounting the burden is upon him of showing that his trust duties have been performed, and the manner of their performance. *Marvin v. Brooks*. 71

2. Defendant B. purchased certain securities under an agreement between him and plaintiff that the purchase should be made by B. on joint account, each to furnish half of the purchase-money. Plaintiff placed in the hands of B. sufficient funds to pay for his half. At the time of the agreement the amount of the securities and the price were not known. In an action for an accounting, *held*, that B. became

the agent of plaintiff as to the half interest of the latter, and a *quasi* trustee of the money placed in his hands, and of the property purchased; that the plaintiff had the right to call B. to account in equity, and the burden was upon the latter of showing both the price paid and what property was purchased. *Id.*

3. Where an authorized agent executes a contract under seal, in which he represents himself as agent, and discloses his principal, and by the terms of which he assumes to contract for the principal only, in the absence of any personal promise or covenant on his part, the contract cannot be held to be his contract and he cannot be made liable individually thereon, although it is signed only in his individual name. *Whitford v. Laidler*. 145

4. A cashier of a bank has, as incident to his office, implied authority to borrow money for it and, in the absence of any statutory restraint, to secure the loan by pledge of its property or funds; and, as against third persons, the assumption of such authority by the cashier will conclude the bank. *Coats v. Donnell*. 168

5. It is within the apparent authority of a baggage-master to check baggage through over connecting lines, and where he receives it and agrees to check it through by a particular route the company is bound, although in fact he had no authority to check it by that route; at least it is a question of fact for a jury. *Isaacson v. N. Y. C. & H. R. R. Co.* 278

6. *It seems* that a baggage-master, in the absence of special authority, cannot bind his company by a contract to carry baggage beyond the terminus of its road, or fixing a special or unusual mode of delivery, as at a place other than the depot of the company. *Id.*

7. In an action against an agent for alleged conversion of money given him to invest, evidence was given

to the effect that plaintiff authorized the investment of the money in a second mortgage to be taken by defendant's wife on a conveyance by her of the mortgaged premises, that the premises were conveyed, the mortgage taken and assigned by the wife to the plaintiff. The premises were sold on foreclosure of the first mortgage. The case was submitted to the jury solely on the question as to whether such assignment was a *bona fide* investment of plaintiff's money. It appeared that interest was regularly paid by the mortgagor from 1871, when the mortgage was given, until 1877. Defendant then offered evidence of the value of the property when the mortgage was given, which was objected to and excluded. *Held* error; that if in fact the mortgage was a substantial and good security when taken and assigned, this was material and proper upon the question of good faith. *King v. MacKellar.* 317

8. Defendant's counsel sought to sustain the ruling on the ground that although the mortgage was taken and assigned by defendant's wife, yet that he was the real party, and the investment was a dealing by him as plaintiff's agent with himself and so invalid. *Held* untenable; as the case was not submitted to the jury on that question. *Id.*

9. An agent authorized to sell the property of his principal may, in the absence of special restrictions, sell in any usual and ordinary way. *Porter v. Wormser.* 431

10. An agent or person acting in a fiduciary capacity is not subject to an action for tort for mere acts of omission, as for not paying over money due, but only for acts of misfeasance, and, in an action against him for not accounting, or not paying over a balance found due on an accounting, the plaintiff does not, by adding to the allegation of refusal to pay an assertion that defendant has converted the money to his own use, convert the action into one for tort;

the addition is mere surplusage. *Segelken v. Meyer.* 473

PRINCIPAL AND SURETY.

1. A surety, bound simply for the fidelity and honesty of his principal in the performance of a contract of employment, may revoke and end his future liability, either where the guaranteed contract has no definite time to run, or where it has such time, but the principal has so violated it that the creditor may lawfully terminate it on account of the breach. *Emery v. Baltz.* 408

2. Where the principal commits an act of dishonesty and is unfaithful to his trust, the employer may end the contract, and the surety may require this to be done. *Id.*

3. The complaint in an action against sureties upon the bond of H., as general agent of an insurance company, set forth the contract of employment, the giving of the bond by H. conditioned for the faithful performance of his duties, and for an accounting and payment over by him each month of all moneys in his hands, and a failure to account and pay over; also the bringing of an action against H., after notice to the sureties of default and the intention to sue, and a recovery of judgment in said action, the issuing of execution and return thereof unsatisfied. The answer averred that defendants "have no knowledge or information sufficient to form a belief as to whether" the agent was at the time of the commencement of the action indebted to plaintiff "in the sum mentioned in the complaint, or in any other sum, and therefore deny the same." *Held*, that the denial was merely of a legal conclusion and put in issue none of the facts alleged in the complaint. *Id.*

4. It appeared that in the action against H. an order of arrest was issued under which he was arrested, and while in jail plaintiff proposed to him that if he would

give an offer of judgment for plaintiff's demand, the latter would release him from jail. Such offer was thereupon given, and he was released; he remained in the State for two months thereafter. *Held*, that such release did not operate to discharge the sureties. *Id.*

5. Defendants offered to prove that after a part of the alleged indebtedness had accrued, and after a breach of his contract on the part of H., the sureties notified plaintiff that they desired to withdraw their bond "and not be liable for any business" thereafter done; that to induce them to remain, plaintiff promised that he would require H. to account monthly and would see "that he did not get behind;" but if he did "he would immediately stop his business" and notify the sureties of the amount of the default; that, relying on this promise, the sureties suffered their liability to remain, and that plaintiff did not perform, but suffered the liability to increase without notification and without stopping H.'s business. This evidence was objected to as immaterial, and excluded. *Held* error. *Id.*

6. It was objected here that the offer did not allege that the sureties knew of the default of H. when they gave such notice. *Held* untenable; as this was fairly implied, and because if the objection had been taken on trial, it might have been explicitly asserted. *Id.*

7. It was also objected that the offer did not aver that the liability of the sureties had been increased beyond the one additional default of which they took the risk. *Held*, that the offer to show that plaintiff failed to stop H.'s business implied that plaintiff allowed it to continue and the indebtedness to increase after a time when, by the agreement, it should have been stopped. *Id.*

8. Although where an obligor and mortgagor sells and conveys the mortgaged premises subject to the mortgage, but with no covenant

on the part of the grantee to pay, no technical relation of principal and surety arises between them, yet as the land is the primary fund for the payment of the debt, in respect thereto and to the extent of its value the grantee stands in the relation of a principal debtor, and the grantor has an equity similar to that of a surety. *Murray v. Marshall.* 611

9. Where, therefore, in such case the holder of the bond and mortgage by a valid agreement with the grantee, and without the assent or knowledge of the grantor, extends the time of payment of the mortgage, to the extent of the value of the land at the time of the agreement, the latter is discharged from liability upon his bond; to that extent the creditor practically takes the land as his sole security and assumes the risk of collecting that amount out of it. *Id.*

10. In an action upon a bond the defense was that a mortgage was given as security for its payment; that defendant conveyed the mortgaged premises subject to the payment of the mortgage, and was discharged by an agreement made, without his assent or knowledge, between the plaintiff and the grantee, whereby in consideration of the payment by the latter of \$500 of the principal and the interest unpaid, the former extended the time of payment of the residue. The trial court found the facts as alleged in the answer, and directed a dismissal of the complaint; there was no finding or request to find as to the value of the land at the time of the extension, and on appeal to this court the evidence was not returned. *Held*, it was a fair inference from the facts found, that the value of the land equaled the amount of the mortgage debt; and that it might properly be assumed in support of the judgment. *Id.*

See GUARANTY.

PUBLIC POLICY

Neither the provisions of the Federal Constitution, giving to Congress power to regulate commerce among the States, nor that which forbids the passage of any law impairing the obligation of contracts, prevents a State from passing laws prohibiting the making of contracts within its jurisdiction, which are deemed immoral or against the public policy of the State. *People v. Noelke*. 137

—When agreement by bank to secure its drafts not invalid as against public policy.

See *Coats v. Donnell*. 168

QUESTIONS OF LAW AND FACT.

In an action against the individual members of a firm a receiver of the firm was allowed to come in and defend; he called O., one of said firm, as a witness; his testimony was not directly contradicted. The court refused to submit the question of his credibility to the jury. *Held* error; that as he was an interested witness the question was for the jury. *Honegger v. Wettstein*. 252

—When question as to contributory negligence is one of fact.

See *Isaacson v. N. Y. C. & H. R. R. Co.* 278

—When question as to character of possession is one of fact.

See *Whiting v. Edmunds*. 309

RAILROAD CORPORATIONS.

1. To bring a case within the provision of the General Railroad Act (§ 7, chap. 282, Laws of 1854), requiring that a bell shall be rung or whistle sounded upon the engine of a train approaching "the place where the railroad shall cross any traveled public road or street," it is not sufficient that the *locus in quo* has been so dedicated to the public, by the owners, as to constitute it a public street;

to bring it within the requirement, the street must be traveled as well as public. *Byrne v. N. Y. C. & H. R. R. Co.* 12

2. Where, therefore, plaintiff was injured at a point where defendant's road crossed an alley, which was not traveled or capable of being traveled save at one end, and such travel did not cross the railroad, *held*, that the omission of the statutory signals was not negligence. *Id.*

3. The courts may take judicial notice of the system of checking baggage by railroad companies, and of the general practice, in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of its route to the next succeeding carrier and so on until it reaches the possession of the last carrier. *Isaacson v. N. Y. C. & H. R. R. Co.* 278

4. It is within the apparent authority of a baggage-master so to check baggage, and where he receives it and agrees to check it through by a particular route the company is bound, although in fact he had no authority to check it by that route; at least it is a question of fact for a jury. *Id.*

5. It seems that a baggage-master, in the absence of special authority, cannot bind his company by a contract to carry baggage beyond the terminus of its road, or fixing a special or unusual mode of delivery, as at a place other than the depot of the company. *Id.*

6. The usual baggage-check delivered to a passenger is not regarded as embodying the contract of carriage, but only as a voucher or token to enable him to identify and claim his baggage at the end of the route. *Id.*

7. In an action to recover for loss of

baggage these facts appeared: Plaintiff held passage tickets for himself and family over defendant's road from New York to Niagara Falls, and also tickets from the latter place to New Orleans by the "Mobile route," in which route it did not appear that defendant had any interest, but it, in connection with defendant's road, formed a continuous line between New York and New Orleans. Plaintiff presented these tickets with his baggage to the baggage-master at defendant's baggage-room in New York city and requested him to check the baggage from New York to New Orleans by the route indicated. The baggage-master examined the tickets, assented to the request and gave plaintiff checks for his trunks, which he put in his pocket without examining. Upon the checks were the words "New Orleans and New York," and also certain letters and abbreviations which, as explained by experts, indicate the several roads forming the "Great Jackson route." Defendant delivered the baggage to the agent of the Great Jackson route at Niagara Falls, and while in transit it was destroyed by an accident. *Held*, that the undertaking of the baggage-master to check by the Mobile route was the undertaking of defendant, and included an agreement to deliver at the end of its road to the next succeeding carrier; that by the delivery to another carrier, in the absence of contributory negligence on the part of plaintiff, it remained liable as insurer; also that the omission of plaintiff to examine the checks was not such contributory negligence as prevented a recovery; that at least it was a question for the jury as to whether he had a right to repose upon the representation of the baggage-master without examining the checks, also as to whether an inspection of the checks would have apprised a person, not an expert or familiar with the roads making up the routes between New York and New Orleans, that a mistake had been made. *Id.*

8. Upon motion to dismiss an appeal by a railroad company to the General Term from an order of Special Term confirming the report of commissioners appointed to condemn certain lands under water in the Hudson river it appeared that under former proceedings the company had obtained possession and begun the construction of an embankment; these proceedings were subsequently annulled and the present proceedings instituted. On application of the company an order was granted allowing it to continue in possession until the final conclusion of the new proceedings, but requiring it to keep open a gap in the embankment for the benefit of the land-owners. The order confirming the commissioners' report provided that, on payment of the sums awarded, the company have full possession, and annulled all orders inconsistent with such possession. The company paid the awards and immediately closed up the gap. *Held*, that by so doing it did not waive its right of appeal from the order; that independent of the order, on payment of the awards, the condemnation was complete and final, the company was entitled to take full possession, the owners were divested of all estate and interest (§§ 17, 18, chap. 140, Laws of 1850), and nothing could be reviewed upon the appeal but the amount of the awards; and so, the company did not avail itself of any benefit conferred by the order appealed from, which should preclude it from appealing. *In re N. Y., W. S. & B. R. R. Co.*
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9. Where a railroad corporation purchased the line of another company, of which an existing bridge formed a part, which bridge at the time of the purchase was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector, and could have been easily and surely ascertained by proper examination, *held*, that it was negligence on the part of the corpora-

tion to continue its use without such an inspection and a correction of the defects; that it was liable to an employee upon one of its trains for injuries received by a fall of the bridge; and this, although the bridge had been in use for several years before the purchase. *Vusburgh v. L. S. & M. S. R. Co.* 874

10. *It seems* that the prior use might have justified a continuance of the use until a competent inspection could reasonably have been made, but did not justify a neglect, when an inspection was made to observe and remedy the defects.

Id.

— *Where in case of bonds issued by a railroad corporation of another State which are valid on their face, it is to be presumed that the provisions of law authorizing their issue have been complied with.*

See Nichols v. Mass. 160

— *Liability of railroad corporation to employ for negligence.*

See Disher v. N. Y. C. & H. R. R. Co. (Mem.) 622

RECEIVER.

1. *It seems* that it is competent for a receiver, appointed in supplementary proceedings, to bring an action either to set aside and annul alleged fraudulent conveyances of his real estate by the debtor, and for a reconveyance of the property by the fraudulent grantee, or to set aside the conveyances as a cloud on title so as to subject the property to levy and sale on execution. *Wright v. Nostrand.* 81

2. In the former case, to maintain the action, it is necessary for him to show such proceedings, in relation to his appointment as receiver, as vest in him title to the real estate; in the latter it is simply necessary to show his appointment and that he rightfully represents the judgment creditor, as whose representative he brings the action, so that the judgment

will be a bar against any one claiming under the original judgment.

Id.

3. An order, made upon the application of the judgment creditor, authorizing the prosecution of the action, by the receiver, is sufficient for this purpose. *Id.*

4. Accordingly *held*, in an action of the latter character, commenced when the Code of Procedure was in force, under an order of the court authorizing it, no question of title being involved, it was not necessary to show a filing and recording of the order appointing the receiver, as required by said Code, in order to vest in the receiver title to the debtor's real estate, nor was it necessary to show, where the real estate was situated in the city of New York, a compliance with the provisions of the act of 1813 (§§ 159, 160, chap. 86, 1 R. L. 1813), in regard to recording transfers of title in the register's office in that city. *Id.*

5. In such an action a question simply affecting the regularity of the appointment of the receiver may not be raised by defendants. *Id.*

6. Proceedings supplementary to execution and for the appointment of a receiver are not special statutory proceedings, such as require affirmative proof of the facts conferring jurisdiction upon the court or officer acting when questioned collaterally, but simply proceedings in the action, and such acts are entitled to all the presumptions of regularity belonging to proceedings in courts of general jurisdiction. *Id.*

7. An order, therefore, in such a proceeding, appointing a receiver, made by the court or judge authorized to make it, is to be presumed regular until annulled in a direct proceeding; and if the order recite facts giving jurisdiction, it is *prima facie* evidence of the existence of those facts. *Id.*

8. Plaintiff was appointed receiver

under a judgment in favor of a bank. *Held*, the fact that the bank had ceased to be a corporation by reason of the appointment of a receiver in bankruptcy of its assets did not invalidate plaintiff's appointment; that it was competent for the receiver of the bank to institute proceedings in its name, to collect the judgment and to procure or sanction the appointment of a receiver of the assets of the judgment debtor. *Id.*

9. It is within the discretion of the court to grant or refuse the application of a purchaser, at a sale by a receiver of an insolvent insurance company, for an order requiring the receiver to complete the sale. The contract, while executory, is subject to the supervisory power of the court. The purchaser by making the application submits himself to its jurisdiction, and if in its judgment the contract is inequitable, it may deny the motion. *In re Attorney-General v. Cont'l L. Ins. Co.* 199

10. Where, therefore, on such a motion it appeared that the petitioner bid off certain shares of bank stock of the par value of \$37,000 for the sum of \$107; that it was known to the purchaser, but not to the receiver at the time of the sale, that in an action brought by certain stockholders of the bank, in behalf of themselves and the other stockholders, against its directors, it had been adjudged that, because of misconduct, the directors were liable to the stockholders for the market value of the stock, at a time specified, and also for an assessment of one hundred per cent, which had been paid by the stockholders, — *held*, that the court properly refused to grant the motion; that although there was no technical legal duty resting upon the purchaser to disclose his knowledge, and even if the receiver was chargeable with negligence, the court was not bound to direct a completion of the sale. *Id.*

11. The firm of W. O. & Co., of New York, ordered certain goods to be

manufactured for them by plaintiffs at Z., Switzerland, at a specified price. Plaintiffs manufactured the goods, but, they having declined in the market, refused to deliver; they offered, however, to give said firm credit for a sum specified, and to send the goods on consignment, W. O. & Co. having the privilege, as fast as the indebtedness was reduced below that sum, to take from the consignment sufficient goods to bring the debt up to the prescribed credit. The goods were delivered with that understanding. In an action against the individual members of said firm to recover for the goods so delivered, M. who had been appointed receiver of the firm in an action to close up the partnership, and who, by order of the court made on his own application, had been permitted to come in and defend, set up as a defense a violation of the revenue laws and proved upon the trial that the goods were sent through the custom-house at a valuation less than the stipulated price, the invoices accompanying them being made out at the market price on the day the goods were shipped from Z., while invoices at the stipulated price were given to the purchasers. The original defendants did not interpose this defense. Plaintiffs' counsel requested the court to direct a verdict against the original defendants with a proviso that plaintiffs should have no remedy as against the funds in the hands of the receiver. This was refused and a verdict directed for all the defendants. *Held* error; that conceding a violation of the revenue laws was proved, as to which *quære*, the original defendants were not entitled to avail themselves of such a defense, as they had not pleaded it. *Honegger v. Wettstein.* 252

12. O., one of said firm, was called as a witness for the receiver; his testimony was not directly contradicted. The court refused to submit the question of his credibility to the jury. *Held* error; that as he was an interested witness, the question was for the jury. *Id.*

13. The order allowing the receiver to come in and defend was granted upon his petition, in which he averred collusion between plaintiffs and one or more of the defendants, but only on information and belief, without stating any facts, or sources of information upon which the belief was based. This averment was positively denied by plaintiffs. *Held*, that the petition was insufficient to support the order and the same was improperly granted. *Id.*

14. Also *held*, that the receiver had no such interest in the action as authorized him to intervene. *Id.*

15. Also *held*, that the order was reviewable here. (Code of Civil Procedure, § 1316.) *Id.*

16. The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure was inherent in the Court of Chancery before the adoption of the Code of Procedure; it was continued by that Code (Subd. 5, § 244), and is not abrogated by the provision of the Code of Civil Procedure (§ 713), defining cases in which receivers may be appointed; but on the contrary is reaffirmed by the general provision of said Code (§ 4), declaring that each of the courts therein named "shall continue to exercise the jurisdiction and powers now vested in it * * * except as otherwise prescribed." *Hollenbeck v. Donnell.* 842

17. Where, however, it appeared that but about one-sixth of the mortgage debt was due, and that the premises were divided into two nearly equal parcels, which could be sold separately without injury to the parties interested, *held*, that assuming the appointment of a receiver of the rents and profits was proper, in the absence of a specific pledge thereof, plaintiff was not entitled to a receivership for the protection of that portion of the debt not yet due, or of that portion of the premises as to which his rights to sell had not accrued; and so, was

not entitled to a receivership of the whole, but only of one of the parcels. *Id.*

18. The provision of the act of 1883 "in relation to the receivers of corporations" (§ 2, chap. 378, Laws of 1883), which fixes the compensation of such receivers, is prospective in its operation, and does not apply to receivers who had been appointed and had entered upon the discharge of their duties before the passage of the act. *People, ex rel. Newcomb, v. McCall.* 587

19. Accordingly *held*, that a receiver of a life insurance company, appointed under the act of 1869 (Chap. 902, Laws of 1869), and who entered upon the performance of his duties prior to 1883, was entitled to have his compensation fixed by the superintendent of the insurance department, as provided by said act (§ 13); and that he was entitled to a *mandamus* to compel the superintendent to so fix his commissions. *Id.*

— *Of manufacturing corporation when not entitled to maintain an action against former stockholder to recover balance unpaid on stock.*

See Billings v. Robinson. 415

REDEMPTION.

Where a person with full knowledge of all the facts, but through a mistaken belief that his interest in real estate was not subject to sale on execution, has lost his title through a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale after the time for redemption has expired, the court has no power to permit a redemption. *Weed v. Weed.* 243

REFERENCE.

Where a judgment entered upon the report of a referee is reversed by the General Term, upon questions of fact, in reviewing its decision here the decision of the referee

will be upheld, unless it appears to be manifestly against or contrary to evidence. If it appear, upon examination of the whole evidence presented by the record, that it has force sufficient to uphold the findings of the referee, or if the evidence is so balanced, it can be seen that inferences drawn from the appearance and manner of testifying of the witnesses might turn the scale, it may be assumed that there were circumstances of the kind proper for the consideration of the referee, and that they affected his determination, and in such case his conclusions will be sustained *Sherwood v. Hauser.* 626

RELEASE.

Where a release is unambiguous in its terms, oral evidence is inadmissible to show that it was intended to embrace other matters not specified therein. *Brady v. Read.* 681

REMEDY.

1. The provision of the Code of Civil Procedure (Subd. 3, § 708), declaring that a person who willfully conceals or withholds from the sheriff property which he has attached, but which has passed out of his hands, shall be liable to double damages "at the suit of the party aggrieved," gives to the attachment and execution creditor a right of action when aggrieved. *Scott v. Morgan.* 508
2. As, however, the remedy thus given exists solely by force of the statute, it must be confined to the cases provided for, and can be resorted to only where injury has been occasioned to the creditor by such willful withholding and concealment. Such an injury can only be shown by a return of the process unsatisfied. *Id.*
3. The right of action also does not exist save where property has been once taken in execution by the sheriff, has passed out of his hands

and he is unable to regain possession, and dispose of it under the authority conferred by the execution. *Id.*

4. Where possession is regained, the statute does not give a remedy for an injury to the property while in possession of the wrong-doer. *Id.*

See ELECTION OF REMEDIES.

RULES.

1. A widow who, by the will of her deceased husband, has a life estate in lands of which he died seized, in case of sale upon foreclosure of a mortgage thereon leaving a surplus, is not entitled, as of right, to a gross sum for the value of her life estate in the surplus to be estimated pursuant to rule 71 of the General Rules of Practice. *In re Zahrt.* 605
2. Said rule simply provides for the manner of estimating the gross sum when it is allowed. *Id.*

SALES.

1. *It seems* that when it appears, in an action to recover for goods sold, by plaintiff's own proof, or upon a defense properly interposed, that the goods were bought and sold for the purpose of being introduced into the country in violation of its revenue laws, and that the vendor shared in the illegal transaction or assisted in defrauding the customs, plaintiff may not recover; but unless it appears upon plaintiff's own showing or is pleaded as a defense, defendant is not entitled to the benefit of it as such. *Honegger v. Wellstein.* 252
2. An agent authorized to sell the property of his principal may, in the absence of special restrictions, sell in any usual and ordinary way. *Porter v. Wormser.* 431

See JUDICIAL SALES.

SATISFACTION.

Satisfaction by one joint tortfeasor is a bar to an action against another; so a partial satisfaction by one is proper to be shown by another in mitigation of damages. *Knapp v. Roche*. 329

SERVICE (AND PROOF OF).

In proceedings to compel an accounting, etc., by an executor, who was a non-resident, the surrogate made an order directing service of the citation either personally or without the State or by publication. Less than six weeks intervened between the day the citation was issued and the day named therein for the return thereof. It was served personally in another State more than thirty days before the return day. *Held*, that the service was sufficient (Code, § 2525); that as service by publication was not resorted to, it was not requisite that the six weeks required for publication should intervene, nor was it necessary to publish the citation in the State paper, as that is only required when service is by publication. (§ 2536.) *In re Macaulay*. 574

STATUTES.

The principle, that the provisions of a local or private act are not affected or repealed by the enactment of a subsequent general law, containing repugnant provisions, does not apply where both acts are either local or private; and the provisions of such an act are subject to be qualified, modified or repealed by repugnant provisions in a subsequent local or private act. *In re Goddard*. 544

— *Chap. 421, Laws of 1855.*

See Hancock v. Rand, 1.

— *Chap. 282, Laws of 1854.*

See Byrne v. N. Y. C. & H. R. R. Co., 12.

— *Chap. 86, Laws of 1813.*

See Wright v. Nostrand, 31.

— 2 R. S. 193, § 158.

See Seward v. Huntington, 104.

— *Chap. 149, Laws of 1811.*

— *Chap. 20, Laws of 1835.*

— *Chap. 531, Laws of 1864.*

See Groat v. Moak, 115.

— 1 R. S. 666, § 29.

See People v. Noelke, 187.

— 1 R. S. 516, §§ 73, 74, 75.

— *Chap. 225, Laws of 1841.*

— *Chap. 383, Laws of 1857.*

See Day v. Day, 153.

— *Chap. 279, Laws of 1833.*

— *Chap. 779, Laws of 1863.*

See Nichols v. Mase, 160.

— 1 R. S. 593, § 9.

See Coats v. Donnell, 168.

— *Chap. 126, Laws of 1871.*

See People, ex rel. v. Mattell, 179.

— *Chap. 379, Laws of 1875.*

See Gibson v. Lenane, 183.

— 2 R. S. 452, §§ 32, 33, 56.

See Dodge v. Stevens, 209.

— *Chap. 93, Laws of 1863.*

See Bliss v. Johnson, 235.

— *Chap. 319, Laws of 1873.*

— 1 R. S. 338, §§ 4 et seq.

— *Chap. 554, Laws of 1880.*

See People, ex rel. v. Sup'rs, 263.

— *Chap. 140, Laws of 1850.*

See In re N. Y. W. S. & B. R. Co., 287.

— *Chap. 291, Laws of 1867.*

See Bennett v. Whitney, 303.

— 1 R. S. 603, § 4.

— *Chap. 431, Laws of 1871.*

— *Chap. 168, Laws of 1878.*

See Paulding v. O. S. Co., 334.

— *Chap. 466, Laws of 1877.*

— *Chap. 318, Laws of 1878.*

— *Chap. 11, Laws of 1877.*

See Pratt v. Stevens, 387.

— *Chap. 379, Laws of 1875.*

See Cornell v. Barney, 394.

— *Chap. 345, Laws of 1860.*

See Vann v. Rouse, 401.

— *Chap. 335, Laws of 1873.*

See People, ex rel. v. Thompson, 451.

— 2 R. S. 150, § 3.

See Segelken v. Meyer, 473.

— *Chap. 678, Laws of 1869.*

See People v. Courtney, 490.

— *Chap. 93, Laws of 1883.*

See In re Paul, 497.

— 2 R. S. 63, § 40.

See Younger v. Duffie, 535.

— *Chap. 335, Laws of 1871.*

— *Chap. 154, Laws of 1877.*

— *Chap. 383, Laws of 1877.*

— *Chap. 124, Laws of 1882.*

See In re Goddard, 544.
 — Chap. 878, *Laws of 1868*.
 — Chap. 902, *Laws of 1869*.
See People, ex rel. v. McCall, 587.
 — Chap. 805, *Laws of 1878*.
See Bergen v. Powell, 591.
 — Chap. 542, *Laws of 1879*.
See Humphrey v. Hayes, 594.
 — Chap. 538, *Laws of 1879*.
See Sanders v. L. S. & M. S. R. R. Co., 641.
 — Chap. 631, *Laws of 1868*.
See Genet v. Brooklyn (Mem.), 645.
 See CODE OF PROCEDURE.
 CODE OF CIVIL PROCEDURE.
 CODE OF CRIMINAL PROCEDURE.
 STATUTE OF FRAUDS.
 LIMITATION OF ACTIONS.

STATUTE OF FRAUDS.

Where objection to contract of sale that it is void under statute of frauds is not taken in pleadings or on trial, it cannot be raised by requests to find.

See Porter v. Wormser. 431

STATUTES OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STIPULATION.

1. Where, upon the trial of a cause, it was stipulated that either party might read from the printed case in another action, "whatever was relevant to this action," and there appeared in said case a stipulation admitting certain facts, which was read without objection, *held*, that the facts must be taken as so admitted; and that the stipulation could not be rejected or disregarded on appeal.
Whiting v. Edmunds. 809
2. As to what might have been the effect of a proper objection interposed in time, *quære.* *Id.*

STOCK.

1. B. held a certificate of ten shares

of the stock of a corporation; by the terms thereof the shares were transferable upon the books of the company only on production of the certificate; B. assigned and transferred the certificate to plaintiff, but no transfer was made on the company's books; after the death of B. defendant, with whom said corporation had been consolidated, without knowledge of such transfer and on representation that the certificate was lost, transferred the stock on its books to B.'s administrator, and issued to him a certificate therefor, upon his executing and delivering to it a bond of indemnity; it also paid to him certain dividends which had been declared upon the stock. In an action to compel a transfer to plaintiff of the stock, and payment of the dividends, *held*, that plaintiff was entitled to a certificate for the ten shares, as the transfer to the administrator was unauthorized; but that defendant was not liable for the dividends, as until notice or knowledge of a transfer it was justified in paying the same to the person in whose name the stock stood upon its books, or to his legal representatives; and that, as the administrator was not required by any rule of law to produce the certificate on payment to him of the dividends, his failure so to do was not such a notice as put defendant upon inquiry before payment; also that the receipt of the bond of indemnity did not affect defendant's rights or charge it with notice.
Brisbane v. D., L. & W. R. Co.

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2. Plaintiff gave in evidence a letter to him from defendant's assistant treasurer, which referred to a letter written by him, wherein he claimed ten shares of the company's stock. *Held*, that this was not notice to the company of ownership of the shares in controversy.
Id.

STOCK-BROKERS.

1. In May, 1869, plaintiff contracted to purchase of defendants, who were stock-brokers and dealers in

government bonds, \$1,000,000 United States four per cent bonds, which the latter agreed to carry for a specified time. Sale notes were delivered by defendants to plaintiff for the amount contracted for, and contemporaneously therewith entries were made of the sales, on defendants' books of sales of bonds; the bonds were described therein as coupon bonds. In June, 1869, plaintiff gave to defendants a "stop order" to sell "\$500,000 at 100.1-4, ex. July coupons and accrued interest \$500,000 do. at 100.1-2 do. do." The stop order authorized a sale at the market price whenever bonds were bought and sold by other parties at the price fixed. On August 13, bonds sold at the Stock Exchange at 101 "flat," i. e., carrying the accrued interest from July 1; thereupon defendants sold \$200,000 at that price on plaintiff's account; the accrued interest at that time was less than one-half per cent; next day bonds sold at 100.5-8, and defendants sold \$300,000 at 101 and 100.7-8, and on August 15 they sold \$500,000 at 100.7-8, the lowest price on that day. The losses on the transaction were charged in plaintiff's account. In an action to open and review the account, *held*, that the first limit of the stop order was reached and a sale was authorized after July 1, when bonds of the description of those in question had sold in the market for a flat price, which, after deducting therefrom the accrued interest from that date, would leave 100.1-2; that as the decline had not reached that point when the first sale was made it was unauthorized; but that plaintiff was only entitled to the damages; and, as it appeared that plaintiff was not injured by the sale, and that the stop order limit was reached the next day, that he was entitled to nothing more than the proceeds of the sale. *Porter v. Wormser.* 431

2. The stop order contained no directions as to the manner of sale; the bonds were sold between the calls at the Stock Exchange at private sale; they were sold as high as, and some higher than the market

price, and it appeared that the bulk of the sales of government bonds were made in this way. *Held*, that, in the absence of evidence to impeach the fairness of the sale, the manner in which it was made was not a ground of objection. *Id.*

3. The headings to the notices of sale sent by defendants to plaintiff indicated that the bonds were bought of plaintiff by defendants; plaintiff claimed that defendants, as his agents, could not purchase, and so that the sales were void; defendants, however, proved that the sales were in fact made to others. *Held*, that defendants were not precluded by the notices from showing the real transactions. *Id.*

4. It appeared by the notice of sale that the bonds sold August 13 were registered bonds. It was claimed by plaintiff here that this was not a sale of plaintiff's bonds, and furnished no basis for charging him with a loss. *Held*, that as this point was not raised by the pleadings, or by any exception appearing in the case, it was not available here. *Id.*

5. Plaintiff's counsel also claimed the original contract of purchase to be void under the statute of frauds, as there was no written note or memorandum signed by him. This objection was not taken in the complaint, and was raised for the first time in the requests for findings. *Held*, that plaintiff was not in a position to question the validity of the contract under the statute. *Id.*

STOCKHOLDERS.

1. Where a stockholder of a manufacturing corporation, whose stock has not been fully paid in, in good faith makes an absolute and valid transfer of his stock to another, he is not liable for calls made after the transfer. *Billings v. Robinson.* 415

2. Defendant subscribed for fifty shares of the stock of a manufacturing corporation; by the sub-

scription agreement he promised to take and pay the par value of said shares, twenty per cent at a date specified, and the balance as called for thereafter by the trustees. Certificates for the said shares were subsequently issued to defendant, and he paid various calls thereon. Thereafter defendant for the avowed purpose of withdrawing from the company, and ending his liability, transferred his stock to M., in the presence of the trustees of the corporation, and resigned his position as trustee, under an agreement, made with knowledge on the part of all the stockholders who had paid on their stock, to the effect that M., and others acting with him, should lend to the company, which agreed to borrow, money enough to pay its existing indebtedness in excess of assets, and M. also executed an agreement to indemnify defendant against claims of creditors, and against future calls. It was also agreed that good checks for the amount of the indebtedness of said company should be placed in defendant's hands to be surrendered as the debts were paid. Defendant's resignation was accepted, his place filled, the transfer was entered on the company's books, defendant's stock account balanced, his certificates were surrendered to and accepted by the company, and attached to the original stubs with the receipt of the company added, and the loan was made as agreed. In an action to recover the balance unpaid on the stock, *held*, that conceding the subscription agreement to pay for the stock was not merged in the implied agreement raised by the after-issue and acceptance of the certificates, but remained a separate and continuing agreement, as to which *quare*, defendant could be released and discharged therefrom by a valid agreement between him and the corporation for the substitution of a new debtor, and that the transaction stated amounted to such a release.

Id.

3. Also *held*, that as plaintiff, who sued as receiver of the corporation, was not shown to represent any

creditor having any equities against defendant, in virtue of his having been a shareholder, he stood simply in the position of the company; and, as it could not, he was not entitled to maintain the action.

Id.

STREETS.

See HIGHWAYS.

SUBROGATION.

1. S. executed certain bonds and a trust mortgage to secure the same; plaintiff took a portion of said bonds at a discount of five per cent, under an agreement that "sufficient of the sum advanced should be used to pay a prior mortgage on the premises;" this was done and the prior mortgage canceled of record. In an action brought to foreclose the trust mortgage it was adjudged that plaintiff's bonds were usurious and void. Plaintiff thereupon brought this action asking to be subrogated to the rights of the prior mortgagee, and to foreclose the prior mortgage. *Held*, that as plaintiff had no right of subrogation save under the agreement to pay off said mortgage, and as that was part of and could not be separated from the usurious agreement, the action was not maintainable. *Baldwin v. Moffett.* 82

2. Three persons, who had jointly indorsed the notes of a manufacturing corporation, entered into a written agreement with each other to the effect that if the corporation should fail to pay said notes at maturity they would each pay one-third of the amount unpaid, and in case of failure of either to pay his proportion, and either of the others should pay more than his share, the one so paying should "have and recover from the one so failing an amount equal to his aliquot part." It was also agreed that each of the parties should execute, to a trustee named, a mortgage as security for the performance of his agreement; and it

was provided that in case of failure of one of the parties to pay his share of the unpaid paper, "and which either of the parties shall have paid in whole or in part, then and in that case the said trustee is empowered, and it shall be his duty, at the request of the parties so having paid, to foreclose the mortgage made by the party" so failing to pay. Mortgages were executed as required, each stated that it was given to secure the payment of \$25,000, according to the conditions of the agreement. The corporation made default in the payment of certain of the notes. In an action brought by the trustee and the holders of certain of said notes to foreclose one of the mortgages, it was shown that the corporation and the indorsers were insolvent, and that nothing had been paid upon said notes by any of the parties. *Held*, that the trust was not created for the benefit of the creditors, but solely for that of the parties to the agreement; that it imposed no primary liability upon the latter; and that the holders of the notes were not entitled to be subrogated to the rights of the indorsers in the securities. *Seward v. Huntington*. 104

8. In an action to foreclose a mortgage, executed by one who was in possession, holding the legal title, but who acquired title by fraud, it appeared that the land had been reconveyed to the original owner by the fraudulent purchaser and that the former had after the reconveyance, and in ignorance of the plaintiff's mortgage, made payments upon a mortgage which was a lien upon the premises at the time of the conveyance by her. *Held*, that she was entitled to be subrogated to an interest in the prior mortgage equal to the sums so paid. *Simpson v. Del Hoyo*. 189

SUPERINTENDENT (OF INSURANCE DEPARTMENT).

Held, that a receiver of a life insurance company appointed under the

act of 1869 (Chap. 902, Laws of 1869), and who entered upon the performance of his duties prior to 1883, was entitled to have his compensation fixed by the superintendent of the insurance department, as provided by said act (§ 13); and that he was entitled to a *mandamus* to compel the superintendent to so fix his commissions. *People, ex rel. Newcomb, v. McCaill*. 587

SUPPLEMENTARY PROCEEDINGS.

1. In an action to set aside alleged fraudulent conveyances made by a judgment debtor the judgment debtor was called as a witness for the defendants and gave material evidence. *Held*, that his evidence, taken in supplementary proceedings, was admissible, not only against him as an admission, but also as against all of the defendants, for the purpose of affecting his credibility by showing conflicting statements. *Wright v. Nostrand*. 81
2. Proceedings supplementary to execution and for the appointment of a receiver are not special statutory proceedings, such as require affirmative proof of the facts conferring jurisdiction upon the court or officer acting when questioned collaterally, but simply proceedings in the action, and such acts are entitled to all the presumptions of regularity belonging to proceedings in courts of general jurisdiction. *Id.*
3. An order, therefore, in such a proceeding, appointing a receiver, made by the court or judge authorized to make it, is to be presumed regular until annulled in a direct proceeding; and if the order recite facts giving jurisdiction, it is *prima facie* evidence of the existence of those facts. *Id.*
4. It seems that the issue and return of an execution *nulla bona* is essential to the validity of an order in supplementary proceedings, as well as to the right to institute an action to reach equitable assets. *Id.*

5. Supplementary proceedings were instituted in April, 1875; plaintiff was appointed receiver therein in February, 1878. It was not shown that the proceedings were adjourned from time to time. *Held*, that the court would not presume a loss of jurisdiction from the omission to show regular adjournments. *Id.*

6. The plaintiffs, in whose favor the judgment upon which the supplementary proceedings were based was rendered, composed the firm of P. & Co.; three of the four members of the firm had become insolvent, and assignees in bankruptcy of their assets had been appointed. *Held*, that said assignees were not authorized to take the firm property, and so their appointment had no effect upon the ownership of the judgment. *Id.*

SURROGATE'S COURT.

1. A petition presented to a surrogate set forth that J. was trustee under the will of McC.; that the petitioner was by the terms of the will entitled to the interest on the trust fund, which was so invested as to yield an annual income, of which at least \$337.60 was then in the hands of the trustee, and that he refused to pay it over, claiming that the petitioner had assigned his interest, which claim, the petitioner averred, was unfounded. *Held*, that the petition was sufficient to entitle the petitioner under the Code of Civil Procedure (§§ 2803, 2804) to an order for an accounting. *In re McCarter.* 558

2. The answer did not deny the validity or legality of the petitioner's claim, but set up the pendency of an action in which the trustee was plaintiff and the petitioner and others were defendants, for the purpose of settling conflicting claims, alleged by the trustee to have been made upon the fund and its income. No proof was given in support of these allegations. *Held*, the facts stated did not in any way tend to show that the petitioner's claim was of

doubtful validity, or that the action was necessary; but if this were otherwise, in the absence of the denial of validity or legality required by the Code (§ 2805), the pendency of the action was immaterial and was no bar to an accounting. *Id.*

3. The verification to a petition upon which a citation was issued by a surrogate, requiring an executor to show cause why he should not file an inventory, render and settle his accounts and pay a legacy, stated that the petitioner "knows the contents thereof, and that the same are true." *Held*, that this was equivalent to saying that they are true, to the knowledge of deponent; and so, that there was a substantial compliance with the provisions of the Code of Civil Procedure. (§§ 2534, 526) *In re Macaulay.* 574

4. The executor was a non-resident. The surrogate made an order directing service of the citation either personally without the State or by publication. Less than six weeks intervened between the day the citation was issued and the day named therein for the return thereof. It was served personally in another State more than thirty days before the return day. *Held*, that the service was sufficient (Code, § 2525); that as service by publication was not resorted to, it was not requisite that the six weeks required for publication should intervene, nor was it necessary to publish the citation in the State paper, as that is only required when service is by publication. (§ 2536) *Id.*

5. An answer of an executor to a petition requiring him to pay a legacy, which simply denies the validity or legality of the petitioner's claim, is not sufficient to require the surrogate to dismiss the petition; it must also set forth facts showing that the claim is doubtful. *Id.*

6. The provision of the said Code, requiring the surrogate to dismiss such a petition when it is not

proved to the satisfaction of the surrogate that there are assets applicable to the payment of the claim of the petitioner, which may be so applied without injuriously affecting the rights of others (§ 2718, subd. 2), does not require a reference to that subject in the petition, or that proof shall be made before the issuing of an order requiring an accounting; but upon return of the citation, if issued upon a petition showing the petitioner to be entitled to a legacy, and that more than a year has elapsed since letters testamentary were issued (§ 2717, subd. 2), the surrogate is authorized to make the order requiring the executor to account (§ 2723, subd. 3); and when that is complied with, if the surrogate is not satisfied that there are in the hands of the executor assets properly applicable to the payment of the petitioner's claim it is his duty to dismiss the petition. *Id.*

TITLE.

The real owner of personal property is only estopped from asserting his title to it when and so far as he has allowed another to have the appearance of ownership. *Hentz v. Miller.* 64

TORT.

An agent or person acting in a fiduciary capacity is not subject to an action for tort for mere acts of omission, as for not paying over money due, but only for acts of misfeasance, and in an action against him for not accounting or not paying over a balance found due on an accounting, the plaintiff does not, by adding to the allegation of refusal to pay an assertion that defendant has converted the money to his own use, convert the action into one for tort; the addition is mere surplusage. *Segelken v. Meyer.* 473

TOWNS

1. A judgment creditor of a town

which has been divided under the act of 1872 (Chap. 319, Laws of 1872) is not entitled to a *mandamus* requiring the board of supervisors of the county to levy and assess the amount due upon the territory formerly included in the town. *People, ex rel., v. B'd Sup'rs Ulster Co.* 263

2. *It seems* that the remedy of the creditor is by *mandamus* against the officers of the towns which have any portion of the territory of the old town, requiring them to meet and discharge the duties devolved upon them by the provisions of the Revised Statutes (1 R. S. 338, §§ 4 *et seq.*), which provisions are at least, in the first instance, exclusive and must be pursued. *Id.*

3. *It seems*, also, that the legislature had power to require the debts of the town to be paid in the way so prescribed. *Id.*

4. The act of 1880, to facilitate the collection of judgments against towns, etc. (Chap. 554, Laws of 1880), has no application to such a case; but simply has reference to towns which have not been divided or altered. *Id.*

See NEW LOTS (TOWN OF).

TREATIES.

— *As to rights of citizens of the Grand Duchy of Hesse, to hold and convey real estate under treaty of 1845.*

See Bollerman v. Blake. (Mem.) 624

TRESPASS.

A trespasser upon real estate may not invoke the aid of a court of equity to preserve to him the fruits of his wrong, by restraining the party who was in possession from resuming his lawful occupation which was taken from him by the trespasser. *Littlejohn v. Attrill.* 619

TRIAL.

1. In an equity action brought to set aside alleged fraudulent conveyances made by a judgment debtor, the defendant is not entitled to a jury trial. The court may frame issues and direct them to be tried before a jury, but this is in its discretion, and its determination is not the subject of review. *Wright v. Nostrand.* 31
2. A witness for plaintiff, on the trial of such an action, testified to the pendency of an action against the judgment debtor at the time of the conveyances, and to an attempt, upon the part of his attorney, to delay the recovery of judgment therein. *Held*, that a refusal to strike out such evidence was not error; that the evidence was proper as showing motive; and that the debtor might fairly be presumed to have had notice of the proceedings on the part of his attorney. *Id.*
3. *It seems* that it is competent for a receiver, appointed in supplementary proceedings, to bring an action either to set aside and annul alleged fraudulent conveyances of his real estate by the debtor, and for a reconveyance of the property by the fraudulent grantee, or to set aside the conveyances as a cloud on title so as to subject the property to levy and sale on execution. *Id.*
4. In the former case, to maintain the action it is necessary for him to show such proceedings, in relation to his appointment as receiver, as vest in him title to the real estate; in the latter it is simply necessary to show his appointment and that he rightfully represents the judgment creditor, as whose representative he brings the action, so that the judgment will be a bar against any one claiming under the original judgment. *Id.*
5. An order, made upon the application of the judgment creditor, authorizing the prosecution of the action, by the receiver, is sufficient for this purpose. *Id.*
6. Accordingly *held*, in an action of the latter character, commenced when the Code of Procedure was in force, under an order of the court authorizing it, no question of title being involved, it was not necessary to show a filing and recording of the order appointing the receiver, as required by said Code, in order to vest in the receiver title to the debtor's real estate, nor was it necessary to show, where the real estate was situated in the city of New York, a compliance with the provisions of the act of 1818 (§§ 159, 160, chap. 86, 1 R. L. 1818), in regard to recording transfers of title in the register's office in that city. *Id.*
7. In such an action a question simply affecting the regularity of the appointment of the receiver may not be raised by defendants. *Id.*
8. On trial of an action for libel, where the alleged libelous publication contained charges injurious to plaintiff's character and to his business, and the complaint averred that by reason of the libel plaintiff had been greatly injured in his business, by the loss of goodwill and patronage, plaintiff was permitted to testify as a witness that immediately after the publication his business fell off, and to state the amount of his daily sales up to and immediately after such publication. The questions were objected to generally. *Held*, defendant could not object on appeal that the complaint was not specific enough to authorize proof of special damage. *Bergmann v. Jones.* 51
9. Where evidence is received under a general objection, the ruling will not be held erroneous unless there are grounds of objection, which could not have been obviated had they been specified, or unless the evidence in its essential nature is incompetent. *Id.*
10. Also *held*, that the evidence was sufficient to justify the submis-

sion of the question of special damage to the jury. *Id.*

11. Also *held*, the fact that other persons had published the same libel, and that similar reports had been in circulation, in regard to plaintiff, did not affect his right to have the question so submitted. *Id.*

12. Where a publication is libelous *per se*, and is proved to be false, this is evidence sufficient to require the submission of the question of malice to the jury, and to warrant the allowance of exemplary damages; and this, although defendant give evidence tending to prove no actual malice. Such evidence is to be considered by the jury, and it is for them to determine, in view of all the evidence, whether punitive damages should be allowed or not. *Id.*

13. It is not a ground for a motion to dismiss the complaint in an action for libel that the innuendoes therein are ambiguous or uncertain; any question as to their meaning may be submitted, upon proper requests, to the consideration of the jury. *Id.*

14. Where the libelous article will bear the construction put upon it in the innuendo no other proof is necessary to show that defendant intended to make the charge against plaintiff imputed to him. *Id.*

15. The firm of W. O. & Co., of New York, ordered certain goods to be manufactured for them by plaintiffs at Z., Switzerland, at a specified price. Plaintiffs manufactured the goods, but, they having declined in the market, refused to deliver; they offered, however, to give said firm credit for a sum specified, and to send the goods on consignment, W. O. & Co. having the privilege as fast as the indebtedness was reduced below that sum, to take from the consignment sufficient goods to bring the debt up to the prescribed credit. The goods were delivered with that understanding. In an action against the individual members of said firm to recover for the goods

so delivered, M. who had been appointed receiver of the firm in an action to close up the partnership, and who, by order of the court made on his own application, had been permitted to come in and defend, set up as a defense a violation of the revenue laws and proved upon the trial that the goods were sent through the custom-house at a valuation less than the stipulated price, the invoices accompanying them being made out at the market price on the day the goods were shipped from Z., while invoices at the stipulated price were given to the purchasers. The original defendants did not interpose this defense. Plaintiffs' counsel requested the court to direct a verdict against the original defendants with a proviso that plaintiffs should have no remedy as against the funds in the hands of the receiver. This was refused and a verdict directed for all the defendants. *Held* error; that conceding a violation of the revenue laws was proved, as to which *quere*, the original defendants were not entitled to avail themselves of such a defense, as they had not pleaded it. *Honeyger v. Wettstein.* 252

16. *It seems* that when it appears, in an action to recover for goods sold, by plaintiff's own proof, or upon a defense properly interposed, that the goods were bought and sold for the purpose of being introduced into the country in violation of its revenue laws, and that the vendor shared in the illegal transaction or assisted in defrauding the customs, plaintiff may not recover; but unless it appears upon plaintiff's own showing or is pleaded as a defense, defendant is not entitled to the benefit of it as such. *Id.*

17. O., one of said firm, was called as a witness for the receiver, his testimony was not directly contradicted. The court refused to submit the question of his credibility to the jury. *Held* error; that as he was an interested witness the question was for the jury. *Id.*

18. *It seems* that where a case has,

by the assent of both parties, been tried upon one theory, the court will not permit it to be sent to the jury on another. *Bennett v. Whitney.* 802

19. Where, upon the trial of a cause, it was stipulated that either party might read from the printed case in another action, "whatever was relevant to this action," and there appeared in said case a stipulation admitting certain facts, which was read without objection, *held*, that the facts must be taken as so admitted; and that the stipulation could not be rejected or disregarded on appeal. *Whiting v. Edmunds.* 809

20. As to what might have been the effect of a proper objection interposed in time, *quarre.* *Id.*

21. Where a complaint alleged that plaintiff intrusted to defendant a sum of money upon his promising to invest the same for the former, but that he converted it to his use and refused to pay the same, *held*, that plaintiff, in the absence of any amendment of the complaint, was not entitled to recover upon proof that defendant did in good faith invest the money, but negligently took insufficient security; that it was necessary to show either that defendant made no investment, or if he did in form, that it was not *bona fide.* *King v. MacKellar.* 817

22. In such an action evidence was given to the effect that plaintiff authorized the investment of the money in a second mortgage to be taken by defendant's wife on a conveyance by her of the mortgaged premises, that the premises were conveyed, the mortgage taken and assigned by the wife to plaintiff. The premises were sold on foreclosure of the first mortgage. The case was submitted to the jury solely on the question as to whether such assignment was a *bona fide* investment of plaintiff's money. It appeared that interest was regularly paid by the mortgagor from 1871, when the mortgage was given, until 1877. Defendant then offered evidence of

the value of the property when the mortgage was given, which was objected to and excluded. *Held* error; that if in fact the mortgage was a substantial and good security when taken and assigned, this was material and proper upon the question of good faith. *Id.*

23. Defendant's counsel sought to sustain the ruling on the ground that although the mortgage was taken and assigned by defendant's wife, yet that he was the real party, and the investment was a dealing by him as plaintiff's agent with himself and so invalid. *Held* untenable; as the case was not submitted to the jury on that question. *Id.*

24. Where a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer. *Knapp v. Rocha.* 829

25. Upon the trial of an action, upon a promissory note, it appeared that defendant executed the note for the accommodation of the payee, who indorsed the same to plaintiff; that said payee was dead, but that for a period of seventeen years after the note fell due he was within the jurisdiction of the court. Defendant then offered to show that plaintiff was in indigent circumstances during this period; this was objected to and excluded. *Held* error; and that the error was not cured, or the objection waived, by the rejection, upon defendants' objection, of evidence offered by plaintiff, tending to explain the delay in bringing suit. *Bean v. Tonnele.* 381

26. The complaint alleged the employment of defendant as attorney, etc., and that while so employed he received the money in question "in a fiduciary capacity," that the same had been demanded, but that he neglected and refused to pay the same and had converted it to his own use. *Held*, that the cause of action was one *ex contractu* not *ex delicto*; that proof that defend.

ant had received money to which plaintiff was entitled was sufficient to sustain the action; that notwithstanding the allegation that defendant received it in a fiduciary capacity, if no order of arrest had been granted during the pendency of the action, the effect of the judgment would not be to subject defendant to an execution against his person (Code of Civil Procedure, § 1487), and so proof of the allegation was not essential. *Segelken v. Meyer.* 473

27. In the cases where under the Code of Civil Procedure (§ 550) the right to arrest depends upon facts extrinsic the cause of action, and where no execution against the person can issue unless an order of arrest has been obtained and executed before judgment, these extrinsic matters need not be alleged in the complaint, and if alleged, are immaterial to the cause of action and need not be proved upon the trial. *Id.*

28. It is not the object of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court, and they cannot, therefore, be properly referred to to ascertain the grounds of decision. *Scott v. Morgan.* 508

29. Where, therefore, a case as settled stated the grounds upon which a motion to dismiss the complaint was made and granted, *held*, that this was controlling and respondent could not refer to the minutes, although incorporated in the record, to show that the motion was also based upon other grounds than those stated in the case. *Id.*

30. But *held*, that respondent had the right, in support of the judgment, to urge any sufficient ground appearing from the record which he might have raised in the court below, provided it could not have been obviated had it been raised on the trial. *Id.*

31. Under the provisions of the Code of Civil Procedure (§ 756 *et seq.*), where, after issue has been joined in an equity action, the plaintiff

transfers his interest, the transferee may move to be substituted as plaintiff; and where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing supplemental pleadings, or an amendment of the complaint, aside from such substitution, the question as to title in the substituted plaintiff is determined by the order, and may not be raised upon the trial; and this, although defendant made default upon the motion. *Smith v. Zakinski.* 519

32. In an action to recover for services as upon a *quantum meruit* plaintiff is not concluded as to the value of the service by the amount originally claimed in the complaint, where the latter has been amended by increasing the amount, nor is he concluded or impeached by discrepancies between different bills of particulars furnished. *Sherwood v. Hauser.* 626

— Where objection to contract of sale that it is void under statute of frauds is not taken in pleadings, or on trial, it cannot be raised by requests to find.

See *Porter v. Wormser.* 431

— General objection to evidence not available on appeal save where the objection could not have been obviated had it been specified.

See *Colleran v. Kennedy.* (Mem.) 634

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

1. Defendant B. purchased certain securities under an agreement between him and plaintiff that the purchase should be made by B. on joint account, each to furnish half of the purchase-money. Plaintiff placed in the hands of B. sufficient funds to pay for his half. At the time of the agreement the amount of the securities and the price were not known. In an action for an accounting, *held*, that B. be-

came the agent of plaintiff as to the half interest of the latter, and a *quasi* trustee of the money placed in his hands, and of the property purchased; that the plaintiff had the right to call B. to account in equity, and the burden was upon the latter of showing both the price paid and what property was purchased. *Marvin v. Brooks.* 71

2. Three persons, who had jointly indorsed the notes of a manufacturing corporation, entered into a written agreement with each other to the effect that if the corporation should fail to pay said notes at maturity they would each pay one-third of the amount unpaid, and in case of failure of either to pay his proportion, and either of the others should pay more than his share, the one so paying should "have and recover from the one so failing an amount equal to his aliquot part." It was also agreed that each of the parties should execute, to a trustee named, a mortgage as security for the performance of his agreement; and it was provided that in case of failure of one of the parties to pay his share of the unpaid paper, "and which either of the parties shall have paid in whole or in part, then and in that case the said trustee is empowered, and it shall be his duty, at the request of the parties so having paid, to foreclose the mortgage made by the party" so failing to pay. Mortgages were executed as required; each stated that it was given to secure the payment of \$25,000, according to the conditions of the agreement. The corporation made default in the payment of certain of the notes. In an action brought by the trustees and the holders of certain of said notes to foreclose one of the mortgages, it was shown that the corporation and the indorsers were insolvent, and that nothing had been paid upon said notes by any of the parties. *Held*, that the trust was not created for the benefit of the creditors, but solely for that of the parties to the agreement; that it imposed no primary liability upon the

latter; and that the holders of the notes were not entitled to be subrogated to the rights of the indorsers in the securities; also that the action could not be maintained, as there had been no breach of the condition of the agreement, authorizing a foreclosure, as neither of the other parties thereto had paid any portion of the sum which the mortgagor was thereby bound to pay. *Seward v. Huntington.* 104

3. A purchase by a trustee for himself of trust property is not absolutely void but is voidable at the election of the *cestui que trust*. *Dodge v. Stevens.* 209
4. Where the purchase is of real estate, and the title has been vested in the trustee by a conveyance, the *cestui que trust* may maintain an action to compel a conveyance to him, or in trust for him by the trustees, and it is no objection to the granting of the relief sought that the defect in his title appears upon the records. *Id.*
5. Where, after having received a conveyance, the trustee executed a mortgage upon the real estate to one having full notice of the rights of the *cestui que trust*, *held*, that the mortgagee might be joined with the trustee as party defendant for the purpose of affording complete relief, and freeing the title from embarrassment by setting aside the mortgage. *Id.*
6. Plaintiff's father died intestate; his mother was appointed administratrix and also general guardian for the infant children, five in number. A settlement of the accounts of said administratrix was had and a final decree entered by the surrogate fixing the shares of the infants; subsequently two of them died intestate. Defendant was the attorney, counsel and proctor for the widow, and as such received moneys belonging to the estate. Upon an accounting he gave to the widow a written acknowledgment stating that there was due to her, as guardian for

the three surviving children, the sum of \$1,500, payable according to the surrogate's decree, interest thereon to be paid semi-annually. Subsequently the widow died and K. was appointed by the surrogate general guardian of the plaintiff, who, being still an infant, brings this action by said K. as his guardian *ad litem*, duly appointed for that purpose to recover his share.

Held, that the action was well brought, and that a good cause of action was shown for \$500; that the acknowledgment was an admission that the money belonged to plaintiff and had been held by his general guardian in trust for him; and, even if not originally collected and received by defendant for plaintiff, but paid over to him by said guardian, as he had knowledge that it was a trust fund, he received it impressed with the same trust, and plaintiff's share therein having been ascertained and agreed upon, he could follow the fund and maintain an action for his share. *Segelken v. Meyer*.

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7. A petition presented to a surrogate set forth that J. was trustee under the will of McC.; that the petitioner was by the terms of the will entitled to the interest on the trust fund, which was so invested as to yield an annual income, of which at least \$337.50 was then in the hands of the trustee, and that he refused to pay it over, claiming that the petitioner had assigned his interest, which claim, the petitioner averred, was unfounded. *Held*, that the petition was sufficient to entitle the petitioner under the Code of Civil Procedure (§§ 2803, 2804) to an order for an accounting. *In re McCarter*.

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8. The answer did not deny the validity or legality of the petitioner's claim, but set up the pendency of an action in which the trustee was plaintiff and the petitioner and others were defendants, for the purpose of settling conflicting claims, alleged by the trustee to have been made upon the fund and its income. No proof was

given in support of these allegations. *Held*, the facts stated did not in any way tend to show that the petitioner's claim was of doubtful validity, or that the action was necessary; but if this were otherwise, in the absence of the denial of validity or legality required by the Code (§ 2805), the pendency of the action was immaterial and was no bar to an accounting. *Id*.

9. Also *held*, that it was in the discretion of the Supreme Court to impose the costs of an unsuccessful appeal from the surrogate's decision upon the trustee personally. *Id*.

10. Also, that upon affirmance here of the judgment of the General Term, the trustee should be charged with the costs. *Id*.

USURY.

1. S. executed certain bonds and a trust mortgage to secure the same; plaintiff took a portion of said bonds at a discount of five per cent, under an agreement that "sufficient of the sum advanced should be used to pay a prior mortgage on the premises;" this was done and the prior mortgage canceled of record. In an action brought to foreclose the trust mortgage it was adjudged that plaintiff's bonds were usurious and void. Plaintiff thereupon brought this action asking to be subrogated to the rights of the prior mortgagee, and to foreclose the prior mortgage. *Held*, that as plaintiff had no right of subrogation save under the agreement to pay off said mortgage, and as that was part of and could not be separated from the usurious agreement, the action was not maintainable. *Baldwin v. Moffett*.

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2. In an action to foreclose a mortgage, the defense was usury. The usurious agreement, as alleged and found, was in substance that the mortgagor should execute the bond and mortgage in question to the mortgagees named, who were creditors of his, and another mort-

gage of \$8,000 to other creditors; which mortgages should be assigned to plaintiff, he paying therefor the sum of \$6,000. It appeared that plaintiff was informed that the mortgagor did owe the mortgagees the sum of \$7,000; that they had agreed to take such security, and would receipt for the amount thereof, and he could purchase the mortgages for the sum specified. The securities were executed, and plaintiff paid, upon assignment thereof to him, the sum agreed, of which sum the mortgagor paid to the mortgagees \$5,000, the mortgagees named in the mortgage in suit receiving \$3,000. The assignment contained a covenant that the full sum of \$4,000 "is secured, owing and unpaid on account of said mortgage." The mortgagor also made a written statement that the mortgage was given to secure the payment of the sum named, that it was due, and that no defense existed. *Held*, that the defense was not sustained; that the bond and mortgage, on delivery to the mortgagees, became valid securities in their hands, and could be sold by them at any price, without imputation of usury. *Dunham v. Cudlipp*. 629

3. But, *held*, that if in fact the real debt owing to the mortgagees was less than the sum named in the mortgage, they could not, nor could plaintiff enforce it for more than the amount of the debt. *Id*.

4. It is the right of a person, in order that he may obtain more than the lawful rate of interest for his money, to require securities which have had a valid inception, and which he may lawfully purchase at a discount greater than such rate; and when securities appearing on their face to be valid and subsisting obligations are produced to him, and he purchases them upon the faith of representations on the part of the parties thereto that they are what they appear, and that there is no defense, the parties are estopped from claiming that they had in fact no inception until thus purchased and so that

they are usurious. *Un. D. Segs. Instn. v. Wilmot*. 221

5. The estoppel also binds the privies in estate of the parties, and when the securities so purchased are a bond and mortgage, a subsequent lienor, whether by mortgage or mechanic's lien, may not interpose the defense of usury, as such lienor can have no better right than the owner or borrower had at the time the lien was created. *Id*.

6. *It seems* that under the law of this State a subsequent lienholder, by mortgage, judgment or mechanic's lien, may avail himself of the defense of usury against a prior mortgage. *Id*.

VENDOR AND PURCHASER.

Where a vendee brings an action to impeach the account of his vendor, on grounds which imply the existence of a formal contract of sale, he cannot question the validity of the contract under the statute of frauds. *Porter v. Wormser*. 431

See JUDICIAL SALES.

VERIFICATION.

1. Where an affidavit of the assignor for the benefit of creditors to the inventory, after stating as required by the statute (Subd. 5, § 3, Chap. 486, Laws of 1877, as amended by § 1, chap. 818, Laws of 1878), that the same was "in all respects just and true," added "to deponent's best knowledge, information and belief," *held*, that there was a substantial compliance with the statute; that it was not essential that the matter sworn to should be wholly within the actual knowledge of the debtor; and that the added words did not modify or detract from those preceding them. *Pratt v. Stevens*. 387

2. The verification to a petition upon which a citation was issued by a surrogate, requiring an executor to show cause why he should not file

an inventory, render and settle his accounts and pay a legacy, stated that the petitioner "knows the contents thereof, and that the same are true." *Held*, that this was equivalent to saying that they are true, to the knowledge of deponent; and so, that there was a substantial compliance with the provisions of the Code of Civil Procedure. (§§ 2534, 526.) *In re Macaulay*. 574

WAIVER.

— *When a railroad by taking possession of and constructing embankments on lands condemned for its use, does not waive right to appeal from order confirming report of commissioners assessing the damages.*

In re N. Y., W. S. & B. R. Co. 287

— *When conditions precedent to right of mortgagee, to take possession under chattel mortgage, waived by surrender of possession.*

Nichols v. Mass. 160

WATER-COURSES.

1. In 1841 the P. C. M. Co. owned lands on both sides of the S. river, also the bed of the river, a dam across it and all the water power created thereby. Upon its lands, on one side of the river, was a cotton factory, on the other side a grist-mill, both run by such water power. In that year said corporation conveyed to C. and M. the grist-mill property, covenanting that the grantee should have and might use the water necessary to operate the grist-mill, "with the exception of the water * * reserved"; by a clause in the deed the grantor reserved to itself "the right at all times to use so much of the water of the river and dam, which now is or may hereafter be therein, or in any dam erected hereafter, as shall be necessary to operate the present or any additional machinery which may be hereafter put in the building now" used as a cotton factory, "or in any building to be erected on the site thereof, of the like or less dimensions." At

the time of the conveyance there was in operation, in the factory, machinery requiring one hundred horse power to operate it. The machinery was subsequently changed, and an addition was built to the factory, in which machinery was placed. Plaintiff succeeded to the rights of the P. C. M. Co., but never operated machinery in the mill requiring more than forty horse power; the machinery in the addition required from ten to twenty horse power to run it. In the summer and fall of 1879 the water of the river was low, and with what was reserved and stored in the pond at night, there was not sufficient to operate plaintiff's machinery in the day-time. Defendant, who had succeeded to the rights of C. and M., continued to draw water from the pond to operate his grist-mill. In an action to recover damages and to restrain a further diversion of the water, *held*, that the reference in the reservation to the machinery then in the factory was a measure of quantity not a limitation on the use; that the quantity so reserved could be used for any purpose or anywhere; but beyond that quantity, if power was desired for additional machinery, it could only be used for such as was placed in the original factory building, or one erected on its site; that, therefore, so long as plaintiff did not use more than one hundred horse power, he could use that quantity to propel the machinery either in the main building or the addition, and up to that point, so far as needed to run his machinery, he was entitled to the exclusive use. *Groat v. Moak*. 115

2. The S. river is a public highway; at the place where the dam was erected it was only navigable by row boats. The right to build and maintain a dam, not exceeding eight feet high, was granted by various statutes (Chap. 149, Laws of 1811; chap. 20, Laws of 1835; chap. 531, Laws of 1864), subject, however, to a condition that through it a lock for the passage of boats should be made and kept in repair. A dam was built many years before 1841

and maintained from the time of its construction down, but no lock was ever constructed therein. In 1841 the dam was about nine feet high; in 1879 it was nine feet five inches high and to the top of the flush-boards, which were used during the whole summer and fall of that year; the height was ten feet six inches. Defendant claimed the right to draw water from the pond when the water was more than eight feet deep at the dam, and at no time used the water when it could not have run over a dam eight feet. *Held*, that such claim was untenable; that, as against the defendant, plaintiff had the right to maintain the dam at any height, and to hold and store the water required to produce power sufficient to operate his machinery, and to use all the water so stored so far as necessary to produce such power; and whenever there was not sufficient water to give that power, any use of it by defendant was unauthorized and unlawful.

Id.

3. Also *held*, that defendant could not object that the dam, as maintained, was unauthorized and an unlawful obstruction of a highway; that plaintiff, as riparian owner, had the right to dam it, and if he unlawfully obstructed its use as a highway, defendant could only complain as a navigator, and on proof that he desired to use the river for navigation.

Id.

4. Also *held*, that, in the absence of proof that any one can, or does, or desires to navigate the river, the dam could in no sense be considered a nuisance such as calls upon a court of equity to deny plaintiff relief; that defendant, as against him, was estopped from denying his right to the water reserved.

Id.

5. Also *held*, that as the acts limiting the height of the dam were private acts, in the absence of evidence of knowledge, plaintiff was not chargeable with notice of the limitation.

Id.

WIDOW.

1. The will of M. gave to S. M. one-third of his residuary estate, in trust, to pay the interest thereof to S. H., on condition that he shall renounce the Roman Catholic priesthood, and gave to him the principal and accumulated interest on condition that he shall marry. In case of the death of S. H. before marriage such share was given to S. M. "at the time of his marriage." S. H. executed an assignment and release of all his interest to S. M.; the latter married, and thereafter died leaving a will; S. H. is still living. *Held*, that the conditions attached to the gift to S. H. were conditions precedent, and until performance he took no vested estate or interest, legal or equitable, in either the principal or income of the fund; that the alternative gift to S. M. was also conditional; that his contingent interest, however, did not lapse upon his death, but survived and was transmissible, and passed to his representatives, who, in case of the death of S. H. before marriage, will be entitled to the fund. *Kenyon v. See.* 563

2. As to whether in case of the marriage of S. H. he would be entitled to the fund, or whether the attempted transfer will operate by way of estoppel, *quære.* *Id.*

3. The will of Z., after directing payment of debts, funeral expenses, etc., gave to his wife during her life "the rents, income, interest, use and occupancy" of all his estate, real and personal, upon condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep said estate in good repair. *Held*, that the provision was inconsistent with the assertion of a dower right, and so must be construed as in lieu of dower; and, the widow having accepted the provision so made, that she could not thereafter claim dower. *In re Zahrt.* 605

4. A widow, who, by the will of her deceased husband, has a life estate in lands of which he died seized,

in case of sale upon foreclosure of a mortgage thereon leaving a surplus, is not entitled, as of right, to a gross sum for the value of her life estate in the surplus to be estimated pursuant to rule 71 of the General Rules of Practice. *Id.*

5. Except in the case of dower which is provided for by the Code of Civil Procedure (Subd. 3, § 2793), whether the widow shall have a gross sum in lieu of a life estate rests in the discretion of the court. *Id.*

6. Said rule simply provides for the manner of estimating the gross sum when it is allowed. *Id.*

WILLS.

1. A devisee who claims a mere legal estate in the real property of the testator, when there is no trust, cannot maintain an action for the construction of the devise, but must assert his title by a legal action, or, if in possession, must await an attack upon it and set up the devise in answer to the hostile claim. *Weed v. Weed.* 243
2. A subscription to a will by the testator after the attestation clause meets the requirement of the statute (2 R. S. 63, § 40), requiring the subscription to be "at the end of the will." The testator by so signing makes the attestation clause a part of the will; and so, as nothing intervenes, the subscription is at the end of the will. *Younger v. Duffie.* 535
3. The complaint, in an action under the Code of Civil Procedure (§ 1861) to establish a will, alleged, in substance, that the testator, an inhabitant of, and domiciled in the county of R., in this State, and possessed of personal property therein, but temporarily residing in Spain, duly signed, published, declared and executed the instrument in question before a notary, that it remains on file in the office of the notary, from which, by reason of the laws of Spain, it cannot be taken, and that plaintiff is a legatee under the

will. *Held*, that a case was made out authorizing the action. *Id.*

4. In proceedings for the probate of the will of H. it appeared that the testator presented the will, which was written by himself, to J., who drew the attestation clause and signed it as a subscribing witness, as did also S. The latter testified that the testator, in answer to questions of J., stated that the instrument was his last will and testament, and thereupon, at his request, the two witnesses signed their names in his presence and in the presence of each other, and that at that time it had been signed by the testator. J. testified he did not recollect all that occurred, but that the testator came to him with a paper which he thought was the one in question, and desired him to witness his will, and in answer to questions put by the witness he acknowledged it to be his last will and testament, and requested witness and S. to sign, and both did so in the presence of the testator and of each other; that he could not swear the testator said that was his signature. *Held*, the evidence sufficiently established the due execution of the will to authorize its admission to probate; and this, although other witnesses who were present contradicted the testimony of the subscribing witnesses. *In re Higgins.* 554
5. The will of Z., after directing payment of debts, funeral expenses, etc., gave to his wife during her life "the rents, income, interest, use and occupancy" of all his estate, real and personal, upon condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep said estate in good repair. *Held*, that the provision was inconsistent with the assertion of a dower right, and so must be construed as in lieu of dower; and, the widow having accepted the provision so made, that she could not thereafter claim dower. *In re Zahrt.* 605
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WITNESS.

The act of 1869 (Chap. 678, Laws of 1869), declaring that on a criminal trial the accused "shall, at his own request, but not otherwise, be deemed a competent witness," is not violative of the provision of the State Constitution (Art. 1, § 6), declaring that no person shall "be compelled in any criminal case to be a witness against himself."

The supposed moral coercion by reason of the adverse inference which might be drawn from the omission of the accused to testify is not compulsion within the meaning of the Constitution. *People v. Courtney.* 490

WORK AND LABOR.

In an action to recover for services as upon a *quantum meruit* plaintiff is not concluded as to the value of the service by the amount originally claimed in the complaint, where the latter has been amended by increasing the amount, nor is he concluded or impeached by discrepancies between different bills of particulars furnished. *Sherwood v. Hauser.* 626

L. G. A. C.

ERRATA.

In *Yates v. Burch* (87 N. Y. 410), after the word "liable" in eleventh line from top of page should be inserted "for, or required to pay the amount of the judgment, save."

In same case, page 411, the word "a" in sixth line from top of page should read "no."

In title to *Coleman v. Burr* (93 N. Y. 17), the word "Appellant" after "Coleman" should read "Respondent," and the word "Respondents" after "*et al.*" should read "Appellants."

In *Seward v. Huntington* (*ante*, p. 115), after the words "all concur" in tenth line from top of page should be inserted "except DANFORTH, J., who took no part."

In *Woodruff v. E. R. Co.* (98 N. Y. 625), the word "plaintiff" in eighth line from bottom of page should read "defendant," and the word "defendant," part in that line and part in ninth line, should read "plaintiff."

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